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EDITOR'S NOTE

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ocketed:
anuary 15, 1986

Title: California Coastal Commission, et al., Appellants
v.
Granite Rock Company

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for appellant: Masouredis, Linus S.

Counsel for appellee: Banke, Barbara R.

try	Date	Note	Proceedings and Orders
1	Jan 15 1986	G	Statement as to jurisdiction filed.
2	Jan 15 1986		Appendix of appellant CA Coastal Comm'n., et al. filed.
4	Feb 5 1986		Order extending time to file response to jurisdictional statement until March 7, 1986.
5	Mar 5 1986		Brief amicus curiae of American Mining Congress filed.
6	Mar 5 1986		Brief amicus curiae of Alaska Miners Association, et al. filed.
7	Mar 5 1986		Brief amicus curiae of Alaska, et al. filed.
8	Mar 7 1986		Motion of appellee Granite Rock Company to dismiss or affirm filed.
9	Mar 12 1986	X	Reply brief of appellants CA Coastal Comm'n., et al. filed.
10	Mar 12 1986		DISTRIBUTED. March 26, 1986
11	Mar 31 1986		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits.
			**********
3	Apr 8 1986		Order extending time to file brief of appellant on the merits until June 6, 1986.
4	Jun 6 1986		Brief of appellants CA Coastal Comm'n., et al. filed.
5	Jun 6 1986		Joint appendix filed.
6	Jun 5 1986		Brief amicus curiae of Alaska, et al. filed.
7	Jun 6 1986		Brief amicus curiae of Big Sur Foundation, et al. filed.
9	Jun 13 1986		Order extending time to file brief of appellee on the merits until August 1, 1986.
10	Jun 6 1986		Brief amicus curiae of Council of State Governments, et al. filed.
11	Jul 31 1986		Brief amicus curiae of American Mining Congress filed.
12	Jul 31 1986		Brief amicus curiae of Alaska Miners Association, et al. filed.
13	Aug 1 1986		Brief amicus curiae of United States filed.
14	Aug 2 1986		Brief of appellee Granite Rock Company filed.
15	Aug 6 1986		CIRCULATED.
16	Aug 4 1986	N	Motion of appellee to strike portions of brief and appendix of The Big Sur Foundation, et al. as amici curiae filed.
17	Aug 20 1986	X	Brief of appellee in opposition to brief of Big Sur Foundation, et al. as amici curiae in support of appellants filed.
18	Aug 18 1986	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

85-1200-AFX

try	Date	Note	Proceedings and Orders
	Sep 10 1986		DISTRIBUTED. Sept. 29, 1986. (Motion to strike portions of brief and appendix of the Big Spur Foundation, et al., as amici curiae).
	Sep 10 1986		
	Oct 6 1986		motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Scalia OUT.
	Oct 6 1986		SET FOR ARGUMENT. Tuesday, December 2, 1986. (2nd case) 1 hour.
	Oct 6 1986		further consideration of the motion of appellee to strike portions of the brief and appendix of the
	Oct 6 1986		Big Sur Foundation, et al., as amici curiae, is deferred to the hearing of the case on the merits.
	Oct 6 1986		Justice Scalia took no part in the consideration or decision of this motion.
	Nov 12 1986	X	Reply brief of appellants CA Coastal Comm., et al. filed.
	Dec 2 1986		ARGUED.

JURISDICTIONAL

STATEMENT

85-1200

No.

Supreme Court, U.S.
FILED
JAN 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

CALIFORNIA COASTAL COMMISSION, et al.,
Appellants,

VS.

GRANITE ROCK COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether state environmental regulation of private mining on federal forest land has, by implication, been preempted by the U.S. Forest Service surface use regulations, 36 C.F.R. §§ 228.1-228.15, when state police power authority to regulate mining is specifically preserved under the 1872 Mining Act and when the Forest Service has itself recognized, in its regulations and in agreements with state agencies, the independent regulatory authority of the states.

2. Whether the Ninth Circuit violated the ripeness doctrine by concluding that state environmental regulation would necessarily conflict with Forest Service regulation even though state regulation has not yet been applied to the subject mining and even though the state acknowledges that it may not deny a permit for the subject mining when state regulation is applied.

PARTIES BELOW

Appellants, who were defendants below, are the members of the California Coastal Commission, Steve MacElvaine, Donald McInnis, Marshall Grossman, Thomas McMurray, Jr., Michael Wornum, Robert Franco, Dorrill Wright, Leo King, Dr. Gordon F. Snow, Dwight Sanders, Charles E. Warren, David Malcolm, Christine Diemer, Mark Nathanson and Duane Garrett,[1] and the Central Coast Regional Director of the Coastal Commission staff, Edward Brown.

Appellee, plaintiff below, is Granite Rock Company, a California corporation.

[1] Appellants Charles E. Warren, David Malcolm, Christine Diemer, Mark Nathanson and Duane Garrett are present Commissioners of the Coastal Commission who succeeded Melvin Nutter, C. Patrick Callahan, Susan Golding, Goerge Shipp III and Carolyn McNeill, previous Commissioners named as defendants.

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No. -

In the Supreme Court

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OCTOBER TERM, 1985

CALIFORNIA COASTAL COMMISSION, et al.,
Appellants,

VS.

GRANITE ROCK COMPANY,
Appellee.

On Appeal from the
United States Court of Appeals
for the Ninth Circuit

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit from which this appeal is taken is reported at 768 F.2d 1077 and is reprinted in Appendix A.* The decision of the United States District Court for the Northern District of California (per Schwarzer, J.), which upheld California's environmental regulation and which was reversed by the Court of Appeals, is reported at 590 F. Supp. 1361, and is reprinted in Appendix B.

JURISDICTION

Granite Rock Company brought this action for injunctive and declaratory relief in the district court under 28 U.S.C. § 1331

* The appendices are printed in a separate volume accompanying this jurisdictional statement.

alleging that state regulation of its mining activities under the California Coastal Act, Cal. Pub. Resources Code §§ 30000-30900 ("Coastal Act") was preempted by federal law and regulations. The district court rejected Granite Rock's claims that the 1872 Mining Act and the Forest Service regulations preempt all reasonable Coastal Act regulation, and entered judgment for defendants. On appeal, the Ninth Circuit reversed, declaring that the Forest Service regulations impliedly preempt all permit regulation under the Coastal Act. The judgment of the Court of Appeals was entered on August 14, 1985 and a timely petition for rehearing was denied on October 17, 1985. See Appendix C. Appellants filed a timely notice of appeal to this Court in the Court of Appeals on November 8, 1985. See Appendix D.

Because the Ninth Circuit's judgment invalidates a state statute on federal constitutional grounds, this Court has jurisdiction of this appeal under 28 U.S.C. § 1254(2). See, e.g., *Hillsborough County, Florida* v. *Automated Medical Laboratories*, ____ U.S. ____, 105 S.Ct. 2371 (1985).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. The Supremacy Clause of the Constitution, Art. VI, cl. 2, provides in pertinent part that:

> "the Laws of the United States . . . shall be the supreme law of the Land".

2. The 1872 Mining Act is codified in various sections of 30 U.S.C. §§ 22-54, the relevant portions of which are reprinted in Appendix E.

3. The Forest Service regulations in 36 C.F.R. §§ 228.1-228.15 are reprinted in full in Appendix F.

4. The relevant provisions of the California Coastal Act establishing a permit system and permit criteria are reprinted in Appendix G.

STATEMENT OF THE CASE

A. The Nature of Granite Rock's in Big Sur

Whether California may apply its regulation to the private mining in this case is of great importance to the state because Granite Rock's open pit limestone mining is taking place in the heart of the scenic, nationally renowned Big Sur Coast, one of the most sensitive and valued portions of California's coastline. The area has great ecological and economic value to California and it is, according to the declaration of Ansel Adams filed in the district court shortly before his death, an area "of unparalleled natural beauty." Appendix H, p.A-87.[2] The mining is occurring just inside the boundaries of the Los Padres National Forest, in close proximity to Molera State Park, the Ventana Wilderness, and the Little Sur River, a protected waterway designated under the California Protected Waterways Act, Cal. Stats. 1973, Res. Ch. 113. The mining activities include bulldozing to scrape away surface land, blasting and excavating an open pit quarry, cutting mining roads along Pico Blanco, and dumping rock waste and overburden on a steep slope 2000 feet from the South Fork of the Little Sur River. App. B, p. A-15; CR 39, Ex. A, p. 1, Ex. C, p. 11; CR 40; Ex. A. There is no dispute that Granite Rock intends to continue mining for the next fifty years and that a twenty-acre quarry is contemplated. App. B, p. A-31.

Under the 1872 Mining Act, miners like Granite Rock may enter federal land for mining exploration, and may obtain a patent and fee title to the land from the federal government upon discovery of a valuable mineral, performance of certain assess-

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[2] Photographic exhibits illustrate how the mining roads cut into Mount Pico Blanco and the limestone quarry are dominant features of the otherwise undisturbed visual landscape. Clerk's docket item ("CR") 38, Hillyer declaration. Pico Blanco is a prominent landmark along the Big Sur Coast which is visible from Highway One, a heavily travelled tourist road, CR 37, para. 3, and a designated State Scenic Highway, Cal. Pub. Res. Code § 30254. The natural beauty of the Big Sur Coast attracts an estimated 2.9 million visitors a year. Monterey County Big Sur Coast Land Use Plan, November 1985, p. 66. The mining is occurring in an area that is a national scenic treasure.

ment work, and payment of either $5 or $2.50 an acre. See 30 U.S.C. §§ 29, 37; *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 658 n.1 (1980); *United States* v. *Coleman*, 390 U.S. 599, 600 n.1 (1968). Once the land is patented, it is fully subject to state police power regulation like any other private land.

Although Granite Rock could obtain a patent on its mining claims which would withdraw the land from any Forest Service regulation, App. B, pp. A-15-16, A-19-20, the company has refrained from doing so, apparently in an effort to avoid state environmental regulation which would then indisputably apply. While Granite Rock owns other limestone-bearing lands in fee outside the federal forest boundary, CR 39, Ex. A, Maps 1, 2, Ex. C, p. 1, which are unquestionably subject to Coastal Act regulation, it has chosen to mine only inside the federal forest boundaries.

B. The Nature of Federal and State Regulation

The Forest Service regulations are designed to "minimize adverse environmental impacts on National Forest System surface resources" caused by mining activities under the 1872 Mining Act, 36 C.F.R. § 228.1 (1985). Under the regulations, miners must submit plans of operation which identify the miner, *id.*, § 228.4(c)(1); the location of the mining, *id.*, § 228.4(c)(2); the nature of the intended operations, *id.*, § 228.4(c)(3); and the measures to protect surface resources, including measures demonstrating compliance with federal and state environmental standards for air and water quality, solid waste, scenic values, fisheries and wildlife habitat, and reclamation, *id.*, §§ 228.4(c)(3), 228.8(a)-(g). The Forest Service regulations also rely on the existence of parallel state permit systems by providing that, "[c]ertification or other approval[s] issued by State agencies . . . of compliance with laws and regulations relating to mining operations will be accepted as compliance with similar or parallel requirements of these regulations," *id.*, § 228.8(h).

The Forest Service conditioned its approval of Granite Rock's four-page plan of operations by providing that "Granite Rock is responsible for obtaining all required permits established by . . . State or local agencies having jurisdiction for environmental

components not under the enforcement authority of the U.S. Forest Service." App. B, p. A-16; CR 39, Ex. B, p. 2. The Forest Service's environmental assessment for Granite Rock's mining also states that "Granite Rock is responsible for obtaining any necessary permits which may be required by the California Coastal Commission", App. B, p. A-31; CR 39, Ex. C, p. 6.

The California Coastal Act was enacted to protect the quality of the coastal zone environment of California and to ensure orderly development of coastal resources. Cal. Pub. Res. Code §§ 30001-30002. The Act provides for issuance of permits for developments in a geographically defined coastal zone in accordance with resource protection and use criteria in Chapter 3 of the Act. *Id.*, §§ 30604, 30106, 30200-30265.5. The Coastal Commission has acknowledged in this litigation that, consistent with federal Supremacy principles, it may not deny Granite Rock a coastal permit.[3] Instead, California seeks to apply its regulation, not for purposes of defining federal land uses, but merely to ensure that a given mining use in a unique coastal area is carried out in an environmentally sensitive and resource-protective fashion.

C. Proceedings Below

After the Coastal Commission staff notified Granite Rock in 1983 that it should apply for a coastal permit, Granite Rock instituted the present action. The district court upheld Coastal Act regulation, finding, *inter alia*, that the Forest Service regulations do not occupy the field of mining regulation on federal land, and that rather than conflicting with Forest Service regulation, Coastal Act regulation complemented the resource protection objectives of the Forest Service. App. B, pp. A-29-31.

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[3] See CR 36, pp. 6, 41-42; Appellees' brief, filed December 7, 1984 in the Ninth Circuit, pp. 9, 36-37, 42. See also Cal. Pub. Res. Code § 30003 which recognizes preemption limits to Coastal Act regulation by providing that agencies should comply with the Act "to the extent possible under federal law or regulations or the United States Constitution."

The Ninth Circuit reversed. While acknowledging that the Forest Service regulations do not occupy the field and that the regulations themselves "recognize that a state may enact environmental regulations in addition to those established by federal agencies," App. A, p. A-9, the court nonetheless concluded that any requirement for a state permit inherently conflicted with the Forest Service's authority. The court also expressly rejected decisions such as that of the Idaho Supreme Court in *State ex rel. Andrus* v. *Click*, 97 Idaho 791, 554 P.2d 969 (1976) which have upheld reasonable state environmental regulation of 1872 Mining Act activities. Instead of analyzing whether there were actual conflicts between state and federal regulation, as the district court and the *Click* court had done, the Ninth Circuit announced a wooden and mechanical rule: if a federal agency issues some form of permit approval for an activity, any state permit requirement for the same activity *necessarily* conflicts with federal authority, regardless of any federal intent to occupy the field. And this *per se* preemption rule—which the Ninth Circuit derived from *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U.S. 152 (1946), and *Ventura County* v. *Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980), without comprehending the very different nature of the federal regulation at issue in those cases—was applied here despite the long history of dual federal and state regulation of mining under the 1872 Mining Act.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL REASONS FOR GRANTING PLENARY CONSIDERATION

Whether the states may apply their own police power regulation to mitigate the adverse effects of private mining on federal land is a recurring federalism question of great importance to the Western States. The Forest Service regulations which were found to displace all state environmental permit regulation apply to 140 million acres of land, 38 Fed. Reg. 34817 (1973), much of it in the West. Because mining can have devastating environmental

impacts[4] and because federal lands constitute such a substantial portion of the West, many Western states besides California provide for environmental permit regulation of mining on lands within their boundaries, including federal lands.[5] For more than a century, the 1872 Mining Act has been a paradigm of cooperative federalism, authorizing dual federal and state regulation of private mining on federal lands. The Bureau of Land Management (BLM) of the Department of Interior has routinely assumed that state regulation, including environmental regulation, supplements federal mining regulation under the 1872 Mining Act. The Forest Service has also entered into cooperative agreements with numerous Western states that recognize and provide for coordination of dual federal and state environmental regulation of 1872 Mining Act activities.[6] Dual regulation benefits both the federal govern-

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[4] According to the Council on Environmental Quality, 1872 Mining Act activities "have destroyed vegetation, . . . caused soil erosion, polluted streams with chemical toxins and possibly carcinogens . . . and disrupted groundwater aquifers—interrupting flow patterns and traditional sources of water supply. In addition, mining has created high noise levels in otherwise natural areas, disrupted wildlife habitats, including those of game as well as endangered species . . . and has left the landscape of some areas scarred with unsightly holes and piles of waste rock and in the case of open pit mining—huge craters." *Hard Rock Mining on the Public Land*, Council on Environmental Quality, U.S. Gov. Printing (1977), p. 13.

[5] See Colorado Mined Land Reclamation Act, Colo. Rev. Stats. §§ 34-32-101 et seq.; Idaho Dredge Mining Protection Act, Idaho Code §§ 47-1312 et seq.; Idaho Surface Mining Act, Idaho Code §§ 1501 et seq.; Montana Metal Mine Reclamation Act, Mont. Code Ann. §§ 82-4-301 et seq.; Ore. Rev. Stats. §§ 517.750 et seq.; Utah Mined Land Reclamation Act, Utah Code Ann. §§ 40-8-1 et seq.; Washington Surface-Mined Land Reclamation Act, Rev. Code Wash. Ann. §§ 78.44.010 et seq.; Wyoming Environmental Quality Act, Wyo. Stats. Ann. §§ 35-11-101 et seq.

[6] See the Forest Service's 1979 Memorandum of Understanding (MOU) with California regarding the California Surface Mining and Reclamation Act, Appendix I; 1981 MOU with Colorado regarding the Colorado Mined Land Reclamation Act, Appendix J; 1983 MOU with Idaho regarding the Idaho Dredge and Placer Mining Protection Act

ment and the states. The Forest Service relies on state regulation because it has limited resources and personnel with which to supervise mining on the millions of acres of federal forest land, and supplemental state regulation ensures the protection of state police power interests which are impacted by mining but which are not of concern to the Forest Service.

The Ninth Circuit's decision not only disrupts this established system of dual regulation, but it squarely conflicts with decisions by the Supreme Courts of Idaho and Wyoming and the intermediate appellate court of Oregon which have upheld reasonable state environmental permit regulation of private mining on federal forest land, notwithstanding the Forest Service's regulations. See *State ex rel. Andrus* v. *Click*, 97 Idaho 791, 554 P.2d 969 (1976) (*Click I*); *State ex rel. Evans* v. *Click*, 102 Idaho 443, 631 P.2d 614 (1981), *cert. denied*, 457 U.S. 1116 (1982) (*Click II*); *Gulf Oil Corporation* v. *Wyoming Oil and Gas Conservation Commission*, 693 P.2d 227 (Wyo. 1985); *State ex rel. Cox* v. *Hibbard*, 31 Ore.App.269, 570 P.2d 1190 (1977). While state appellate courts within the Ninth Circuit have found that federal and state environmental regulation of mining may coexist, the Ninth Circuit found such dual regulation to be inherently incompatible. The question presented is then whether the 1872 Mining Act's provision for dual cooperative federal and state mining regulation, which has been confirmed by a century of case law and administrative practice under the Act, will continue; or whether the Ninth Circuit's decision will upset this system, generate conflicts between the state and federal courts in the Ninth Circuit, and cripple the states' ability to protect against the detrimental effects of mining on a vast scale throughout the West.

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and Idaho Surface Mining Act, Appendix K; 1981 MOU with Oregon regarding the Oregon Reclamation of Mining Lands Act, Appendix L; 1984 MOU with Utah regarding the Utah Mined Land Reclamation Act, Appendix M; 1971 Agreement with Washington regarding the Washington Surface-Mined Land Reclamation Act, Appendix N; 1980 MOU with Wyoming regarding the Wyoming Environmental Quality Act, Appendix O.

SUMMARY OF ARGUMENT

1. Congress, through the 1872 Mining Act, established a dual system of federal and state regulation of mining. The 1872 Act preserves a meaningful role for the states by which they may apply their police power to private mining on federal land. The Forest Service did not intend, and in any event lacks the power to alter the balance of federal-state authority which Congress struck in the 1872 Act. The Ninth Circuit erroneously ignored the 1872 Mining Act, the case law under it, and BLM's practice under the Act, all of which confirm that state power to apply environmental regulation like that in this case is preserved by the 1872 Mining Act.

2. The language of the Forest Service regulations, the Forest Service's practice under them, and the circumstances attending adoption of the regulations establish that the regulations are not intended to preempt state environmental regulation. Instead, the Forest Service relies upon independent state environmental regulation to help protect forest surface resources. The Ninth Circuit not only misconstrued the intent of the Forest Service regulations, but it ignored the evidence of Forest Service statements in this very case that Granite Rock should obtain state permits, including a Coastal Act permit. In so doing, the Ninth Circuit has substituted its own notion of what the federal-state regulatory relationship should be in place of that established by Congress in the 1872 Mining Act and by the Forest Service under its regulations.

3. Instead of focusing on the specific features of the particular mining regulatory regime involved in this case, the Ninth Circuit relied on the general, abstract notion that the issuance of both federal and state permits for an activity is inherently incompatible and necessarily impermissible. Such a *per se* preemption rule is erroneous. The idea that a coincidence of federal and state regulation automatically leads to preemption was rejected long ago by this Court, and rightly so, since federal and state regulation of a single activity is commonplace in our complex society and our federal system. The crucial preemption inquiry is not the presence of overlapping regulation, but whether federal regulation was meant to be exclusive—a question clearly answered in the

negative by the 1872 Mining Act and the Forest Service regulations. Moreover, state environmental regulation clearly complements the Forest Service's resource protection objectives and does not conflict with any federal regulatory purposes or interests.

4. Finally, because this case involves a purely facial challenge, because state regulation has not yet been applied, and because the state is fully sensitive to its obligation to avoid any actual conflicts with Forest Service requirements, the Ninth Circuit's presumption that state regulation will necessarily conflict with federal regulation when state regulation is applied is contrary to basic ripeness principles. Moreover, such a judicial presumption deprives the states at the outset of the ability to show that they can function as responsible, albeit subordinate governments in our federal system.

I.

THE NINTH CIRCUIT'S DECISION UPSETS THE WELL-ESTABLISHED SYSTEM OF DUAL FEDERAL AND STATE REGULATION OF MINING UNDER THE 1872 MINING ACT

The Ninth Circuit's decision glaringly ignores the nature of the regulatory scheme under the 1872 Mining Act and upsets the federal-state balance crafted by that legislation. Because it evolved from and largely incorporated pre-existing state regulation, the 1872 Mining Act is a classic example of what Justice Rehnquist has aptly termed "cooperative federalism", *California* v. *United States*, 438 U.S. 645, 650 (1978). For almost two decades after the 1849 Gold Rush in California, there was no general federal law of mining on federal land. The miners themselves (in local mining districts) and state and territorial legislatures created mining rules to fill the void. See *Jennison* v. *Kirk*, 98 U.S. 453, 457-49 (1878); see also Swenson, "Legal Aspects of Mineral Resources Exploitation", in Gates, *History of Public Land Law Development*, (1968) pp. 708-723. When Congress

finally enacted legislation in 1866 and 1870,[7] which culminated in the 1872 Mining Act, it simply corrected the status of miners as trespassers on federal land, set minimum federal rules for the acquisition of mining rights and the disposal of federal land title, and left the rest of the regulation to state and local jurisdictions. By allowing prospectors to enter the public domain to locate valuable minerals and then obtain title to the land for a nominal sum, the 1872 Mining Act, like the Homesteading and Railroad grant acts, was simply another piece of legislation in the Manifest Destiny era providing for the transfer of the public domain and its resources into private hands as a way of settling the West.

Far from establishing a comprehensive federal regulatory program that occupied the field, the legislation confirmed preexisting state regulation,[8] and incorporated state law not in conflict with minimum federal requirements as the source of much of the Mining Act's rules. See 30 U.S.C. §§ 22, 26, 28, 38, 43. Rather than preserving exclusive federal regulatory authority over federal land, the legislation was premised on the notion of giving away federal land at bargain basement prices.[9] Indeed, since the district court concluded that the private miner in this case could obtain a

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[7] See the Act of July 26, 1866, 14 Stats. 251 (lode mining) and Act of July 19, 1870, 16 Stats. 217 (placer mining). The 1872 Mining Act refined the earlier 1866 and 1870 legislation, but was based on the same general principles and policies, see Cong. Globe, 42d Cong. 2d Sess. 1872, p. 534 (remarks of Sen. Sargent), p. 2457 (remarks of Sen. Stewart).

[8] See, for example, the remarks of Senator Stewart that the original 1866 legislation "is a simple confirmation of the existing conditions of things in the mining regions . . . endorsing the mining rules", Cong. Globe, 39th Cong., lst Sess. 1866, p. 3234, and that, "it proposes no new system but sanctions, regulates and confirms a system to which the people are devotedly attached", *id.*, p. 3227.

[9] Thus, Senator Sherman candidly stated in the 1866 debates that the nominal purchase price for mineral lands, "gives [the miners] the lands for probably less than it will cost to lay them out, survey them, locate them, plat them, and sell them so that it is substantially a grant of the mineral lands to the settlers in the mining regions." Cong. Globe, 39th Cong., lst Sess., 1866, p. 3236.

patent and entirely remove its mining activity from *any* Forest Service regulation, the very structure of the mining law is inconsistent with the Ninth Circuit's notion of a need to preserve exclusive Forest Service jurisdiction. And while the 1872 Mining Act conferred certain federal mining rights upon miners, such rights were not intended to immunize miners from state regulation because the rights themselves were conditioned and limited by state law criteria.[10] Thus, state regulation supplementing minimum federal requirements for mining on federal land under the 1872 Act has long been upheld. See, e.g. *Kendall* v. *San Juan Silver Mining Co.*, 144 U.S. 658, 664-665 (1892) (claim recording requirements); *Butte City Water Co.* v. *Baker*, 196 U.S. 119 (1905) (locational requirements); *Erhard:* v. *Boaro*, 113 U.S. 527 (1885) (work requirements); cf. *Forbes* v. *Gracey*, 94 U.S. 762 (1876) (state taxation of unpatented mining claims).

While environmental protection was generally not a state concern in earlier years, the one exception was the control, through the common law of nuisance, of hydraulic mining practices in the 19th Century that were devastating rivers and farmland in California. See *Woodruff* v. *North Bloomfield Gravel Mining Co.*, 18 Fed. 753, 772-779 (9th Cir. 1884); *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 151-152, 4p.1152 (1884); 3 Lindley, *Mines*, § 849, p.2093-2099, (1914). In more recent times, as the states' police power concerns have evolved to address more modern needs, state environmental regulation of 1872 Mining Act activities has also been upheld. See *Click I*, *supra*, 554 P.2d at 976; *Click II*, *supra*, 631 P.2d at 617; *State ex rel. Cox* v. *Hibbard*, *supra*, 570 P.2d at 1193.

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[10] For example, the right of miners to enter upon federal lands for mining under 30 U.S.C. § 22 is not unqualified but is granted "according to the local customs or rules of miners in the several mining districts." The right of miners to the exclusive possession of mining claims is granted "so long as [miners] comply with . . . state, territorial and local regulations". 30 U.S.C. § 26. And 30 U.S.C. § 43 provides that "any state or territory may provide rules for working mines" which may be conditions of sale that are "fully expressed in the patent" issued to miners.

The BLM has had no difficulty in concluding that the state police powers preserved under the 1872 Mining Act include environmental protection, as well as the more traditional matters of location and recording: "'The Mining Law of 1872 specifically preserves the applicability of state law governing possessory rights to locators, and we have not read this specific provision to imply that other state powers, *including those governing environmental protection*, were not preserved." Letter from James M. Parker, Associate BLM Director to J. Allen Overton, Jr., Pres., American Mining Congress (Feb. 1, 1982), reprinted in Kimball, *Impact of BLM Surface Management Regulations On Exploration and Mining Operations*, 28 Rocky Mtn. Min. Law Inst. 509, 562 n.241 (1983) (emphasis added). Indeed, BLM assumes the applicablity and regularly takes state environmental and permit regulation into account in administering the 1872 Mining Act.[11] It is not surprising then that when BLM adopted its own surface protection regulations in 43 C.F.R. §§ 3809-3809.6 (1985)—which are identical in structure and which were specifically patterned after those of the Forest Service, 45 Fed. Reg. 78903, 78906 (1980)—BLM was quick to state that nothing in its regulations "shall be construed to effect a preemption of state laws and regulations relating to the conduct of operations or reclamation on Federal lands under the mining laws." 43 C.F.R. § 3809.3-1.[12]

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[11] Thus, state environmental controls are one cost factor considered by BLM in determining whether a miner has located a "valuable mineral" under the 1872 Mining Act and is entitled to a patent or possesses a valid mining claim. See *United States* v. *Kosanke Sand Corp.*, 80 I.D. 538, 546 (1973); *United States* v. *Pittsburgh Pacific Co.*, 84 I.D. 282, 290-291 (1977). The failure to obtain state permits for mining activities is a reason for issuing a miner a notice of noncompliance with BLM's surface protection regulations. *Bruce W. Crawford Et. Ux.*, 92 I.D. 208, 235 (1985). And the presence of state environmental regulation is a reason for the Interior Board of Land Appeals' rejection of Forest Service environmental objections to mining activities on lands withdrawn for powersite purposes. *U.S. Forest Service* v. *Milender*, 92 I.D. 175, 183-184 (1985).

[12] BLM's comments accompanying this regulation state that, "[i]t has been the view of the Department of the Interior that under section 3

In short, the 1872 Mining Act preserves the states' police power to apply environmental protection requirements to private mining activities being carried out on federal lands under the Act. Insofar as the Ninth Circuit read the 1872 Act to provide otherwise, or insofar as the circuit court somehow read the Forest Service regulations as negating powers reserved to the states under the 1872 Act, the court erred. To be sure, state environmental regulation may not be applied so as to completely prohibit all mining or totally thwart the exercise of private mining rights. But even those state courts which have struck down excessively prohibitory state environmental regulation have concluded that reasonable nonprohibitory state regulation is valid. See *Brubaker* v. *Board of County Commissioners*, 652 P.2d 1050, 1055-1056, 1058-1059 (Colo. 1982); *Elliott* v. *Oregon International Mining Co.*, 60 Ore. App. 474, 654 P.2d 663, 667-668 (1982). Here, the Ninth Circuit left no room at all for *any* state environmental permit regulation, and that holding conflicts with all the state court decisions on the subject, with BLM's interpretation of and practice under the Mining Act, and with 100 years of case law sanctioning supplemental state mining regulation under the 1872 Mining Act.

II.

THE NINTH CIRCUIT MISCONSTRUED THE FOREST SERVICE REGULATIONS BECAUSE THE REGULATIONS THEMSELVES INCORPORATE AND RELY ON STATE REGULATION

Rather than supporting the Ninth Circuit's conclusion about the preemptive effect of the Forest Service regulations, the language of the regulations, the Forest Service's practice in applying them, and the circumstances attending their adoption all

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of the 1872 Mining Law [30 U.S.C. 26] the states may assert jurisdiction over mining activities on Federal lands in connection with their own state laws" and that "[t]he adoption and implementation of this final rulemaking is not intended to preempt the continued application and enforcement of state law and regulation governing the conduct of activities pursuant to the United States mining laws." 45 Fed. Reg. 78908 (1980).

lead to the opposite conclusion of nonpreemption—a conclusion which, unlike the Ninth Circuit's, is consistent with the system of dual regulation under the 1872 Mining Act.

Thus, the Forest Service regulations are replete with provisions sanctioning the application of state law to mining operations. See 36 C.F.R. § 228.8(a) (state air quality standards); *id.*, § 228.8(b) (state water quality standards); *id.*, § 228.8(c) (state standards for solid wastes); *id.*, § 228.9 (state public safety laws and regulations); *id.*, § 228.11 (state fire laws). The regulations provide not that the *Forest Service* has discretion to selectively incorporate state law criteria in its approval of a mining plan, but rather that the *mining operator* "shall comply" with state standards and laws. Moreover, by providing that state "certification[s]" or "approval[s]" of compliance with state laws may be accepted as satisfaction of "similar or parallel requirements of these regulations", *id.*, § 228.8(h), the Forest Service regulations *necessarily* presume the existence of independent state permit systems. Section 228.8(h) cannot function and has no meaning unless states can issue permits (or certifications or approvals) based on independently-effective state law criteria that parallel the very criteria in the Forest Service regulations. It would be incongruous for the Forest Service to incorporate compliance with state law as an obligation on the miner, and provide for state approvals as a functional equivalence mechanism for satisfying federal resource protection criteria, and then "deny [states] the only practical tool" by which that may be done. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 531 n.18 (1977).

The Forest Service practice of entering into formal agreements with states that recognize state permit regulation of 1872 Mining Act activities on forest land and provide for coordination of dual federal and state regulation, see fn. 6, *supra*, is clearly inconsistent with the idea that Forest Service regulation is exclusive. Some of these cooperative federal-state agreements implement § 228.8(h) of the Forest Service regulations by providing a mechanism for satisfying Forest Service requirements through state permit pro-

cedures.[13] Rather than ousting all state permit regulation, the Forest Service's practice has been to *rely* on state regulation to assist in protecting forest surface resources. Given the limited enforcement capability of the Forest Service[14] and given the obviously complementary nature of state environmental permit regulation, "[i]t is difficult to believe that the [federal agency] intended to deprive itself of effective aid from local officers experienced in the kind of enforcement necessary . . . —aid of particular importance in view of the [federal agency's] small staff." *California* v. *Zook*, 336 U.S. 725, 737 (1949); see also *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 446 (1963) (Brennan, J., concurring).

The total absence of any indication in the Forest Service regulations of an intent to preempt state environmental regulation is telling. "[B]ecause [federal] agencies . . . can speak through a

[13] For example, in California, the Forest Service has entered into MOUs with a number of local governments which provide that the Forest Service will accept, as functional equivalents to its requirements, mining operation and reclamation plans submitted to local governments under state mining reclamation laws when such state plans meet or exceed Forest Service standards. See MOUs with the Counties of Del Norte, Appendix P; Fresno, Appendix Q: Inyo, Appendix R; Madera, Appendix S; and Modoc, Appendix T. A federal practice to accept state approvals as the functional equivalent of federal approvals—as is provided for in § 228.8(h) and these agreements—is inherently inconsistent with the notion of implied preemption. *See Union Brokerage Co.* v. *Jensen*, 322 U.S. 202, 209 (1944).

[14] The Congress' Office of Technology Assessment notes in *Management of Fuel and Nonfuel Minerals in Federal Land* (1979), that it is "in a practical sense impossible" for the Forest Service to ensure compliance with its surface protection resources. "Each ranger district . . . can encompass millions of acres, and only one or a few persons, if any, will be available and qualified to administer and enforce the regulations", p. 196. See also, *Hardrock Mining on the Public Land*, *supra*, p.19. ("[e]nforcement of the mining regulations has stretched Forest Service personnel very thin, especially in . . . Idaho, Montana, Nevada, Utah, Wyoming and Colorado; for example, on the Toiyabe National Forest, Nevada, Austin District, one District Ranger is responsible for overseeing 1.4 million acres of land.").

variety of means, including regulations, preambles, interpretive statements and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Hillsborough County, Florida* v. *Automated Medical Laboratories*, ____ U.S. ____, 105 S.Ct. 2371, 2377 (1985).

The history and circumstances leading up to the 1974 adoption of the Forest Service regulations also argue against any preemptive intent. For more than 70 years after passage of the 1897 Organic Administration Act, the Forest Service thought that it lacked authority to adopt surface protection regulations like those in 36 C.F.R. §§ 228.1-228.15.[15] The states provided the surface resources and environmental regulation to fill the void prior to adoption of the Forest Service regulations.[16] Indeed, the mining industry argued against the need for Forest Service regulation precisely because state environmental regulation was already

[15] See for example the June 6, 1969 letter from Edward Cliff, Chief, Forest Service to Senator Frank Church, stating that the Forest Service "has no authority to . . . 'restrict actual mining operations . . . or to regulate or control the type of mining involved such as "open pit", "strip" or, subsurface.' " reprinted in 115 Cong. Record 18231-18232 (July 2, 1969); see also Dempsey, *Forest Service Regulations Concerning the Effect of Mining Operations on Surface Resources*, 8 Nat. Res. Lawyer 481, 482 (1975); Parcel, *Federal State and Local Regulation of Mining Exploration*, 22 Rocky Mtn. Min. Law Inst. 405, 408-409 (1976); Ferguson & Haggard, *Regulation of Mining Law Activities in the National Forests*, 8 Land & Water L. Rev. 391, 404 (1973).

[16] For example, the Idaho Dredge and Placer Mining Protection Act was enacted in 1955 and was being applied to mining on federal forest land by 1972 at the latest. See *State ex rel. Andrus* v. *Click*, supra, 554 P.2d at 972-973. Moreover, the Forest Service's Agreement with the State of Washington acknowledging state environmental regulation of forest land mining and providing that state reclamation plans would be made in coordination with the Forest Service was entered into in 1971, well before the Forest Service had adopted any surface use regulations. See App. N, p. A-108. To appellants' knowledge, this Agreement is still in effect.

supplying the necessary controls.[17] Surely the Forest Service would have made its preemptive intent plain if it had intended to displace such preexisting state regulation, particularly since the Forest Service had entered into at least one pre-1974 agreement providing for Forest Service participation in such state regulation. See fn. 16, *supra*.

Moreover, because the Organic Administration Act of 1897, 16 U.S.C. § 480, expressly preserves state civil jurisdiction within the national forests, *United States* v. *County of Fresno*, 429 U.S. 452, 455 (1977); *Wilson* v. *Cook*, 327 U.S. 474, 486-487 (1946), and because 16 U.S.C. § 551a authorizes the Forest Service to cooperate with states in the enforcement of state laws on the national forests, the Forest Service's own organic legislation leads to the conclusion that state environmental regulation has not been preempted.

The Ninth Circuit's sole rationale for implying preemption was its belief that the Forest Service must balance or "fine tune" the federal interest in resource protection against the federal interest in promoting mining, and that *any* state permit regulation would undermine the Forest Service's ability to perform this balancing and maintain the "reasonableness" of environmental measures. App. A, p. A-9-10. The Ninth Circuit read far more into the Forest Service regulations than they can bear. The Forest Service is not concerned at all with promoting mining under the federal mining laws. The Forest Service regulations on their face disclaim any purpose "to provide for the management of mineral resources" and acknowledge that that is the responsibility of the Department of Interior. 36 C.F.R. § 228.1; see also Forest Service Manual §§ 2817.03, 2817.23 (1983). Thus, the notion that the Forest Service must delicately balance competing federal mining promotion and resources protection objectives is wholly unfounded. Significantly, the federal agency which is charged with promoting mining and managing federal mining policy—the Department of Interior—acknowledges that state environmental reg-

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[17] See Dempsey, supra, p. 483-484; *Hard Rock Mining on the Public Land*, supra, p. 29.

ulation is fully preserved under the 1872 Mining Law. (Supra at p. 13).

While the Forest Service regulations take into account the economic burdens on miners in determining the "reasonableness" of surface protection measures, see 36 C.F.R. § 228.5(a), that unexceptional provision was included to assuage mining industry concerns about cost burdens, see 39 Fed. Reg. 26038 (1974), and to minimize the risk of legal challenges to the new regulations and the litigation burdens of enforcing them.[18] If preemption was implied every time a federal agency sought to accommodate the regulated industry by providing that its regulation would be "reasonable" in application, there would not be much room for any state regulation. There is no evidence of any kind that the "reasonable" character of Forest Service regulation was understood or intended to preempt any state regulation.[19] While Forest Service regulation has "reasonable" limits in the sense that it

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[18] See the Forest Service's Emergency Directive No. 3 on the new regulations, dated August 9, 1974, pp. 1-2, noting that, "unreasonable demands made as conditions for approval of operating plans will hazard court challenges." See also *Hard Rock Mining on the Public Land*, supra, p. 18 ("By its own admission, the Forest Service has moved very cautiously in enforcing these regulation and has gone to considerable lengths to avoid litigation.") Given the limited enforcement capability of the Forest Service, securing the willing cooperation of the miner to "reasonable" conditions was a practical necessity. See Forest Service Manual, § 2817.03 (1983) ("securing the willing cooperation of prospectors and miners" is the "primary means for obtaining protection of surface resources").

[19] That "reasonable" Forest Service conditions were intended to set a ceiling not to be exceeded is also belied by the Forest Service's cooperative agreements with state and local goverments that acknowledge "more stringent" state permit requirements, see App. O, p. A-111, and state approvals that "meet *or exceed*" Forest Service standards, see Appendices, I, p. A-90; P, p. A-115; Q, p. A-119; R, p. A-123; S, p. A-127; T, p. A-131 (emphasis added). At least in this case, the only determination we have bearing on the reasonableness of other regulation is the Forest Service's conclusion that Granite Rock should obtain state permits, including a coastal permit—evidence which the Ninth Circuit disregarded.

cannot be applied to deprive miners of their mining rights under the 1872 Mining Act, one can always find some legal dimension against which federal regulation must be "reasonable." That such a "reasonableness" calculus does not compel preemption is plainly illustrated by the BLM surface use regulations which are subject to identical "reasonableness" constraints yet contemplate independent state environmental regulation.

Insofar as the Ninth Circuit was disturbed by the permit form of state regulation, there is nothing in the 1872 Mining Act, the Forest Service regulations, or the Forest Service's own organic legislation that distinguishes between state permit or non-permit regulation, or which indicates that the former is somehow impermissible. Indeed, the distinction has no meaning in this case since California acknowledges that it cannot deny a permit in order to prohibit all mining by Granite Rock. The permit is merely an administrative vehicle for attaching non-prohibitory environmental conditions on mining.

While the Ninth Circuit stated that a state may still "urge" the Forest Service to withhold mining approval for failure to comply with "applicable" state standards, App. A, p. A-9, anyone can always urge suggestions upon the Forest Service. The Ninth Circuit's dicta should not mask the fact that the states are left with nothing under the court's decision, and indeed, the court's dicta will likely proliferate regulatory problems and uncertainty.[20]

By imputing preemptive intent to the Forest Service regulations, the Ninth Circuit has read § 228.8(h) out of the regula-

[20] For example, it is unclear how the Forest ranger in the field, who is probably unfamiliar with state regulatory policies and requirements and who lacks the time and resources to administer state police power regulation, should determine what are "applicable" state standards and how they should be interpreted and applied. Why Coastal Act regulation should not already be deemed "applicable" when the Forest Service has already indicated that Granite Rock should obtain a coastal permit is also a mystery. Moreover, how the Ninth Circuit's fuzzy conception of the role of state regulation will fit with BLM's practice of administering the 1872 Mining Act on the assumption that state regulation applies is unclear, and will undoubtedly spawn further litigation.

tions, upset a host of federal-state cooperative agreements for state environmental regulation throughout the West, and deprived states of any meaningful environmental role in regulating mining activities under the 1872 Mining Act.

III.

THE NINTH CIRCUIT MISAPPLIED BASIC PREEMPTION PRINCIPLES BY CONCLUDING THAT DUAL FEDERAL AND STATE PERMITTING IS NECESSARILY IMPERMISSIBLE EVEN WHEN FEDERAL REGULATION HAS NOT OCCUPIED THE FIELD

Rather than heeding the admonition that preemption turns on the unique features of the particular federal regulatory program involved, *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624, 638 (1973), the Ninth Circuit posited a general preemption principle of no dual federal and state permitting and then concluded that any Coastal Act permit regulation was invalid. This preemption analysis is fatally flawed. What the Ninth Circuit did, in a nutshell, was to find that the Forest Service regulations "do not . . . occupy the field of establishing environmental standards" for mining, App. A, p. A-9, and then go on to invalidate Coastal Act regulation by applying none other than an occupation of the field analysis. Thus, the Ninth Circuit's inquiry was "whether federal law establishes authority in a federal agency to prohibit or permit mining in national forests conditioned on meeting environmental protection standards and, if so, whether state permit authority . . . intrudes into that sphere of authority." Id, p. A-8-9. This is a classic "occupation of the field" analysis. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947); *Pacific Gas & Electric* v. *Energy Resources Commission*, 461 U.S. 190, 212-213 (1983).[21]

[21] Indeed, the Ninth Circuit derived its preemption test largely from *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152 (1946) and *Pacific Gas & Electric*, supra,—two occupation of the field cases. The extent to which *First Iowa* is still good law is highly questionable in light of *California* v. *United States*, 438 U.S. 645 (1978).

While the Ninth Circuit spoke in terms of a state permit system "undermin[ing] the Forest Service's . . . permit authority", App. A, p. A-9, the operative concept was one of an *inherent conflict* arising simply from dual federal and state permit regulation, which is an occupation of the field analysis. To be sure, when Congress or a federal agency does intend to occupy the field, any state regulation, even though it be coincident or complementary, is ousted. But there are many instances in our complex society where activities may be subject to both federal and state permit requirements and where dual regulation or permitting based on similar criteria does not offend the Supremacy Clause.[22]

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[22] For example, that the U.S. Army Corps of Engineers has issued a permit for dock construction in navigable waters of the United States does not preclude a state from also requiring a permit for the project, *Cummings* v. *Chicago*, 188 U.S. 410, 431 (1903); nor does federal licensing of customhouse brokers prohibit a state from requiring a license to do business within the state, *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202, 207-208 (1944); nor does federal licensing of marine terminal facilities preclude state licensing of such facilities on similar environmental grounds, *Askew* v. *American Waterways Operators Inc.*, 411 U.S. 325, 337 (1973); nor does federal licensing of Indian traders on Indian Reservations preclude state liquor licensing of such traders, *Rice* v. *Rehner*, 463 U.S. 713 (1983); nor does certification of a commodity under federal marketing orders preclude a state from imposing additional state certification requirements, *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132 (1963); nor does federal licensing of blood plasma vendors preclude a state from imposing additional operating requirements on such vendors, *Hillsborough County Florida* v. *Automated Medical Laboratories*, supra, 105 S.Ct. 2371 (1985); nor does federal licensing of vessels preclude imposition of state smoke emission requirements on such vessels, *Huron Portland Cement* v. *Detroit*, 362 U.S. 440 (1960); nor does issuance of a Forest Service permit for fish traps anchored on Forest Service land preclude the application of state conservation laws, *Kake Village* v. *Egan*, 369 U.S. 60 (1962). As stated in *Kake Village*, supra, the Forest Service permit does not "grant[ ] a right to be free of state regulation . . . Like a certificate by the Interstate Commerce Commission [i]t is simply acknowledgment that the activity does not violate federal law, and not an exemption from state licensing or police power requirements." *Id.* at 63.

The crucial preemption inquiry is not whether a federal agency exercises permit authority on a particular subject on which a state also seeks to regulate, but whether Congress or the federal agency intended federal permit authority to be *exclusive*. The notion that the "coincidence" of federal and state regulation automatically leads to preemption was rejected long ago. *California* v. *Zook*, 336 U.S. 725, 730-732 (1949); see also *Florida Lime & Avocado Growers* v. *Paul*, supra, 373 U.S. at 142. Thus, the predicate for what the Ninth Circuit called the "*First Iowa* doctrine", is an intent to *eliminate* dual regulation or to "occupy the field"—not simply a coincidence or overlap of federal and state permit authority. Here, the Forest Service regulations incorporate state regulatory requirements and rely on state permit approvals as a substitute mechanism for achieving federal environmental goals; the Forest Service legislation, 16 U.S.C. §§ 480, 551a, preserves state civil jurisdiction and authorizes Forest Service cooperation in enforcing state law; and the 1872 Mining Act is replete with provisions authorizing state regulation, 30 U.S.C. §§ 22, 26, 28, 38, 43. Accordingly, the Ninth Circuit's conclusion about the absence of any federal occupation of the field in this case is not only undeniable, but it renders the *First Iowa* doctrine inapplicable.

Having found no occupation of the field, the proper inquiry—which the Ninth Circuit failed to undertake—was whether state regulation is nonetheless preempted because it actually conflicts with federal regulation or frustrates federal regulatory objectives. E.g., *Silkwood* v. *Kerr-McGee Corp.*, ___ U.S. ___, 104 S.Ct. 615, 621 (1984). There is no evidence or any finding by the Ninth Circuit that it is impossible for a miner to obtain both federal and state permits; or that any coastal permit conditions might conflict with, or prevent a miner from complying with Forest Service criteria; or that the surface protection purpose of the Forest Service regulations would be frustrated by additional state environmental protection.[23] In short, there is no basis for any

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[23] Insofar as state permit conditions may be *identical* to those of the Forest Service, it is hard to see how supplemental state enforcement of identical federal criteria can possibly create any conflict, particularly given the Forest Service's limited enforcement capability. See *Califor-*

preemption conflict in this case other than the Ninth Circuit's notion of an "inherent" conflict arising from dual federal and state regulation.

The preemption rule announced by the Ninth Circuit—that there can be no dual federal-state permit review of an activity even when there is no federal occupation of the field and even when no actual conflicts of any kind with federal policy or objectives are demonstrated—is an erroneous preemption rule. Such a *per se* rule would invalidate a host of state permit regulation to satisfy an implied preemption purpose "which would be only the product of [a] Court's imagination", *California* v. *Zook*, *supra*, 336 U.S. at 732-733.

Finally, insofar as the Ninth Circuit relied on *Ventura County* v. *Gulf Oil Corporation*, 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.* 445 U.S. 947 (1980),[24] that case not only involved an entirely different regulatory regime under the 1920 Mineral Leasing Act, 30 U.S.C. §§ 181 et seq., (which implicates a different set of federal interests), but it concerned an impermissible local

nia v. *Zook*, supra, 336 U.S. at 735-737; *Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U.S. 714 (1963). Insofar as California may seek to protect *other* resource values that are not of concern to the Forest Service—for example, minimizing mine tailing pollution and road cut erosion into the Little Sur River, a designated protected waterway under state law—the Forest Service's approval of the mining plan of operations sanctions state permit enforcement of environmental components "not under the enforcement authority of the U.S. Forest Service", CR 39, Ex. B, p. 2. The Forest Service regulations merely set minimum standards to protect federal surface resources interests, but do not preclude further state environmental protection particularly when it is directed at other legitimate police power interests.

[24] This Court's summary affirmance of the *Ventura* judgment is, of course, an affirmance of the result and not necessarily the reasoning of the Court of Appeals. E.g. *Pacific Gas & Electric Co.* v. *Energy Resources Commission*, supra, 461 U.S. at 212 n.24. This court's subsequent decision in *Commonwealth Edison* v. *Montana*, 453 U.S. 609, 633-36 (1981) has completely undercut the notion in *Ventura* that state regulation impermissibly interferes with a general federal interest in promoting mining.

prohibition or "veto" of mining, which, unlike the nonprohibitory regulation at issue here, presented a direct preemption conflict.[25]

IV.

THE NINTH CIRCUIT'S PREMATURE CONCLUSION ABOUT A CONFLICT BETWEEN STATE AND FEDERAL REGULATION VIOLATES THE RIPENESS DOCTRINE

Because this case involves only a facial challenge to Coastal Act regulation, the question whether Coastal Act regulation will actually conflict with Forest Service regulation or private mining rights is not ripe on the present record. By reaching out and concluding that state permit regulation must be deemed to necessarily conflict with Forest Service authority and objectives, the Ninth Circuit violated some basic ripeness and prudential limitations of Supremacy Clause jurisprudence.

[25] Unlike the 1872 Mining Act which grants minerals to private parties without payment of royalties and provides for the complete disposal of federal land title, the 1920 Leasing Act allows only leasing of land and requires payment of rents and royalties to the federal government, 30 U.S.C. § 226, which can be received in kind as a percentage of the oil and gas produced, 30 U.S.C. § 192. While miners under the 1872 Act control the extent of any mineral development, the federal government *requires* lessees under the 1920 Act to exercise due diligence in prospecting and development, and can cancel leases for lack of diligence, 30 U.S.C. § 183, 187. The federal government, in short, is just as much an interested miner as the private lessee under the 1920 Act. The crux of the *Ventura* holding is that a local government attempt to prohibit mining by a government lessee actually conflicts with dominant federal interests in securing royalties and ensuring marketability of federal leases—federal interests that are totally absent under the 1872 Mining Act. While the 1872 Act was a product of the Manifest Destiny philosophy of disposing of federal resources, the 1920 Act was prompted by the Conservation movement philosophy of retaining federal ownership of natural resources. Today the "two [mining] systems stand incongruously side by side each shaped by the political and economic forces peculiar to its own era." 1 *American Law of Mining*, Rocky Mtn. Law Foundation, § 1.28, p. 86 (1983).

This Court has repeatedly emphasized that alleged preemption conflicts must be real, actual in fact, and irreconcilable, e.g. *Florida Lime & Avocado Growers* v. *Paul*, supra, 373 U.S. at 141; *Goldstein* v. *California*, 412 U.S. 546, 553 (1973), and not merely speculative or hypothetical, *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 131 (1978). "In this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin seeking out conflicts between state and federal regulation where none clearly exists.'" *Id.* at 130, quoting *Huron Portland Cement* v. *Detroit*, 362 U.S. 440, 446 and *Seagram & Sons* v. *Hostetter*, 384 U.S. 35, 45. Courts "must be careful to distinguish those situations in which the concurrent exercise of a power by the Federal government and the States . . . *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise." *Goldstein* v. *California*, *supra*, 412 U.S. at 554-555 (emphasis in original). And, "whenever possible, [courts] should 'reconcile the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.'" *Ray* v. *Atlantic Richfield*, 437 U.S. 151, 182-183 (1978), quoting *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 361.

Thus, this Court has often held that whether an actual preemption conflict exists cannot be determined until state regulation has been applied in a particular case, e.g., *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 389 (1983); *Pacific Gas & Electric* v. *Energy Resources Commission*, supra, 461 U.S. at 203; *Askew* v. *American Waterways Operators*, supra, 411 U.S. at 337; *Seagram & Sons* v. *Hostetter*, 384 U.S. 35, 46 (1966); cf. *Williamson County Regional Planning Commission* v. *Hamilton Bank*, ___ U.S. ___, 105 S.Ct. 3108, 3117-3119 (1985), "[f]or even action which seems pregnant with possibilities of conflict may, as consummated, be wholly barren of it," *Rice* v. *Chicago Board of Trade*, 331 U.S. 247, 255-256 (1947). Because the Coastal Act on its face does not prohibit all mining, and because the Coastal Commission has consistently acknowledged throughout this litigation that it cannot prohibit all mining or block the exercise of private mining rights, California can and should be allowed to prudently construe and apply its regulation to avoid any actual conflicts with federal regulation.

See particularly *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 161-162 (1952), and *DeCanas* v. *Bica*, 424 U.S. 351, 363-365 (1976); *Askew* v. *American Waterways Operators*, supra, 411 U.S. at 331; *Seagram & Sons* v. *Hostetter*, supra, 384 U.S. at 46.

CONCLUSION

The Court should note probable jurisdiction and set the case for plenary consideration.

DATED: January 15, 1986

Respectfully submitted,

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APPENDIX

No. 85-1200

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

CALIFORNIA COASTAL COMMISSION, ET AL.,
Appellants,

VS.

GRANITE ROCK COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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APPENDIX A

In the United States Court of Appeals
For the Ninth Circuit

No. 84-2146
D.C. No. CV 83-5137 WWS

[Filed Aug. 14, 1985]

Granite Rock Company, a corporation,

Plaintiff-Appellant,

vs.

California Coastal Commission, an Administrative Agency of the State of California,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

Argued and Submitted March 14, 1985
San Francisco, California

OPINION

Before: WALLACE and POOLE, Circuit Judges,
and STEPHENS,* District Judge.

WALLACE, Circuit Judge:

Granite Rock Company (Granite Rock) appeals the district court's refusal to enjoin the California Coastal Commission (Coastal Commission) from requiring Granite Rock to obtain a state permit in order to continue mining on federally owned forest land. *Granite : k Co. v. California Coastal Commission,* 590 F.Supp. 1361 (N.D. Cal. 1984) (*Granite Rock*). We have jurisdiction under 28 U.S.C. § 1291. We reverse.

---

* Honorable Albert Lee Stephens, Jr., United States District Judge, Central District of California, sitting by designation.

I

Granite Rock is engaged in the business of mining chemical grade white limestone. Its mining operations involved in this appeal are located on an unpatented mining claim on land owned by the federal government in the Los Padres National Forest at Pico Blanco. Granite Rock acquired the mining claim at Pico Blanco in 1959 pursuant to the Act of May 10, 1872, ch. 152, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C.) (Mining Act). It began mining the claim in 1981 after the United States Forest Service (Forest Service) approved its five-year plan of operations, which it had submitted as required for significant mining activities pursuant to regulations implemented under the Act of June 4, 1897, ch. 2, 30 Stat. 11, 35 (codified as amended in scattered sections of 16 U.S.C.) (Organic Administration Act).

In 1983, the Coastal Commission advised Granite Rock that the California Coastal Act, Cal. Pub. Res. Code §§ 30000-30900 (West 1977 & Supp. 1985) (Coastal Act), required the company to obtain a state permit to continue its mining operations. The California legislature passed the Coastal Act in 1976 pursuant to the state's inherent police powers, as a reenactment of a 1972 initiative, and as an implementation of the federal Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (CZMA), which encourages state regulation of coastal zones. Granite Rock brought this action for declaratory and injunctive relief to prevent the Coastal Commission from enforcing the state permit requirement. Because there were no factual issues in dispute, Granite Rock brought a motion for summary judgment challenging the state's legal authority to require the permit.

The district court denied Granite Rock's motion for summary judgment and then dismissed the action. *Granite Rock*, 590 F.Supp. at 1364, 1375. The court first reasoned that the land on which Granite Rock's claim was located did not fall within the CZMA's exclusion from the state's coastal zone. *Id.* at 1367-70. The district judge then concluded that the permit requirement was valid because states have concurrent legislative authority with Congress to regulate activities on federal lands within the coastal zone, the mining claim was not a federal enclave subject exclusively to federal regulation, and no federal statute or regulation

preempted the state requirement. *Id.* at 1371-74. Granite Rock appeals.

II

The property clause of the Constitution states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Granite Rock argues that this is a grant of exclusive legislative power to Congress. It argues that states acquire power to regulate the use of federally owned property only if Congress expressly grants this power to them. Thus, because the federal government holds the title to the land in question, Granite Rock argues that California had no inherent police power to regulate the mining activity. The Coastal Commission concedes that the property clause grants Congress legislative power over federal lands, but it argues that the power is not exclusive—that states have concurrent legislative power to regulate the use of federal lands unless and until Congress affirmatively exercises its property clause power to preempt state regulation. We need not resolve this dispute over the proper interpretation of the property clause, however, if Congress has exercised its power to preempt the state's permit requirement. We, therefore, turn initially to that issue.

The Supreme Court recently articulated the test for federal preemption:

> [S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615, 621 (1984) (citations omitted) (*Silkwood*).

Granite Rock argues that the state permit requirement is preempted either by the CZMA or by the Mining Act and certain Forest Service regulations promulgated under the Organic Administration Act. It contends that the CZMA preempts the state permit requirement because the CZMA evidences an intent on the part of Congress to reserve exclusively to itself the power to regulate the use of lands excluded from the coastal zone and because the CZMA excludes the land in question. Granite Rock argues that the Mining Act and Forest Service regulations preempt the permit requirement because the requirement stands as an obstacle to the accomplishment of the full purposes and objectives of the statute and regulations. It contends that the purpose of the Mining Act is to encourage mining and that the state permit requirement is an obstacle to accomplishing this purpose either because the state will prohibit mining altogether on the land in question or because it will condition a permit on unreasonable state environmental requirements.

The Coastal Commission argues that none of the federal law relied on by Granite Rock preempts the state permit requirement. It contends that the CZMA does not exclude the land in question from its coastal zone and thus, instead of preempting the permit requirement, the CZMA actually authorizes it. The Coastal Commission argues that if a previous act of Congress could conceivably be read as preempting the permit requirement, the CZMA neutralizes its effect over land within the coastal zone. The Coastal Commission also argues that the Mining Act does not preempt state environmental regulation of federal lands unless the regulation prohibits mining altogether and that the question whether the Coastal Commission will refuse Granite Rock's permit application based on a per se policy of prohibiting mining at Pico Blanco is not yet ripe.

We need not decide whether the CZMA evidences a congressional intent to take exclusive power over regulating the use of any federal lands excluded from the coastal zone if the Coastal Commission's argument that the CZMA neutralizes the preemptive effect of other federal law over lands within the coastal zone is incorrect. Under these circumstances, the Mining Act and

Forest Service regulations provide a narrower ground for us to decide the preemption issue in this case.

A.

The legislative intent is clear on whether the CZMA neutralizes other federal law which might preempt the state. The Conference Committee stated that "[t]he Conferees . . . adopted language which would make certain that there is no intent in this legislation to change Federal or state jurisdiction or rights in specified fields." Conf. Rep. No. 1544, 92d Cong., 2d Sess.____, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4822, 4824. This passage refers to section 307(e)(2) of the CZMA, 16 U.S.C. § 1456(e)(2), which states that "[n]othing in this chapter shall be construed . . . as superseding, modifying, or repealing existing laws applicable to the various Federal agencies."

Similarly, the Senate Report demonstrates Congress' intent not to restore state authority within the coastal zone if a federal act otherwise preempts it over a specific subject matter. In its statement of the CZMA's purpose, the Senate explained that the CZMA is merely a cooperative funding provision that "has as its main purpose the encouragement and assistance of States in preparing and implementing management programs to preserve, protect, develop and whenever possible restore the resources of the coastal zone of the United States." S. Rep. No. 753, 92d Cong., 2d Sess. ____, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4776, 4776. The Senate indicated that the CZMA is designed to promote this purpose of "enhanc[ing] state authority," *id.*, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4776, through the means of providing "Federal grants-in-aid to coastal states to develop coastal zone management programs [and] . . . grants to help coastal states implement these management programs once approved." *Id.*, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4776. *See also Secretary of the Interior v. California*, 104 S. Ct. 656, 659 (1984) (*Secretary of the Interior*). These grants were intended only to give coastal states an incentive "*to exercise their full authority* over the lands and waters in the coastal zone," 16 U.S.C. § 1451(h) (emphasis added), and not to

restore authority that the states might previously have lost through federal preemption. *See* S. Rep. No. 753, 92d Cong., 2d Sess. _____, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4795 ("There are no changes in existing law resulting from this legislation.").

Thus, even if we assume that the land in question falls within the coastal zone, the legislative history and certain provisions of the CZMA conclusively demonstrate that Congress intended the CZMA *not* to change the status quo with respect to the allocation of state and federal power over lands within the coastal zone. Moreover, Congress gave no indication that it perceived the status quo as limiting its power over such lands. *Cf.*, *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 657-60 (1982) (Congress' manifest perception of the status quo in subcontracting claims found to be accurate). Therefore, we now consider the preemptive effect of Mining Act and Forest Service regulations.

B.

The purpose of the Mining Act is to encourage mining on federal lands. *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981) (*Weiss*); *see also United States v. Goldfield Deep Mines Co.*, 644 F.2d 1307, 1309 (9th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). In 1970, Congress renewed its adherence to this policy, although it also declared its fidelity to the additional goal of lessening any adverse environmental impact from such mining. 30 U.S.C. § 21a. Then, in 1974, the Secretary of Agriculture promulgated regulations " 'to minimize adverse environmental impacts on National Forest System surface resources' that can be caused by mining, while, at the same time, not interfering with the rights conferred by the mining laws." *Weiss*, 642 F.2d at 297, *quoting* 36 C.F.R. § 252.1 (1975) (recodified at 36 C.F.R. § 228.1 (1984)). *See generally* 36 C.F.R. pt. 228 (1984). These regulations require miners to notify the Forest Service of any mining related operation that is likely to "cause disturbance of surface resources." *Id.* § 228.4(a). "The initiation or continuation of such an operation is subject to the approval of the Forest Service." *Weiss*, 642 F.2d at 297. *See* 36 C.F.R. §§ 228.4-.5 (1984).

Although a general federal purpose to encourage a particular activity does not automatically preempt state environmental regulation that incidentally discourages the activity, *see, e.g.*, *Silkwood*, 104 S. Ct. at 626; *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 220-23 (1983) (*Pacific Gas*); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633 (1981), we disagree with the Coastal Commission's converse argument that a state regulation which prohibits mining unless the miner obtains a state permit automatically escapes preemption if issuance of the permit is conditioned only on reasonable requirements. In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946) (*First Iowa*), the Supreme Court held that the Federal Power Act, which establishes a federal permit system authorizing the construction of hydroelectric dams, preempted a state law that prohibited such activity unless the petitioner first obtained a state permit. The Court reasoned that

> [t]o require the petitioner to secure the actual grant to it of a state permit . . . as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the "comprehensive" planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.

Id. at 164 (footnote omitted). The Court applied the same reasoning in *Sperry v. Florida*, 373 U.S. 379 (1963), to hold that a federal patent regulation, which governed the issuance of federal permits allowing the preparation and prosecution of patent applications, preempted a state law that prohibited such activity unless a state permit to practice law was first obtained. *Id.* at 385. In neither case did the Court make a prohibition/regulation distinction and inquire into the reasonableness of the state's conditions for issuing or denying the permit. The additional permit system was preempted simply because it would undermine the federal permit authority.

We applied the same reasoning in *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980), to hold that the Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-287, preempted a county zoning ordinance that prohibited oil exploration and extraction activities on federal land unless a county permit was first obtained. 601 F.2d at 1084. We determined that there was an actual conflict between local and federal governments because "the Ventura authorities wish[ed] to regulate conduct which Congress has authorized." *Id.* We reasoned that the Departments of Interior and Agriculture had already issued federal permits, and thus "Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress." *Id.*

The Court has recognized that the *First Iowa* doctrine extends only to state permit mechanisms that actually intrude into the sphere of federal permit authority. Thus, in *Pacific Gas* the Court held that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2394, did not automatically prevent California from prohibiting the construction of nuclear power plants unless a state permit was first obtained certifying that adequate storage facilities and means of disposal was available for nuclear waste. *See* 461 U.S. at 203-24. Although the Atomic Energy Act gives the Nuclear Regulatory Commission the authority to issue building permits if the construction and operation of a given nuclear power plant would be safe, the Court found that the specific state permit requirement addressed only economic and not safety concerns. *See id.* at 217-20. The Court expressly rejected the argument that states may prohibit new construction of nuclear power plants "until [their] safety concerns are satisfied by the Federal Government." *Id.* at 212. Thus, because the Atomic Energy Act does not give the Nuclear Regulatory Commission "comprehensive planning responsibility" beyond safety and into economic planning and because the state provision "d[id] not interfere with the type of plant that could be constructed," the Court held that the *First Iowa* doctrine did not apply. *Id.* at 223 n.34.

In deciding whether the *First Iowa* doctrine applies in this case, we must determine whether federal law establishes authority in a federal agency to prohibit or permit mining in national forests

conditioned on meeting environmental protection standards and, if so, whether the state permit authority exercised in this case intrudes into that sphere of authority. We conclude that Forest Service regulations mandate that the power to prohibit the initiation or continuation of mining in national forests for failure to abide by applicable environmental requirements lies with the Forest Service. 36 C.F.R. §§ 228.4-.5 (1984). We find unpersuasive the argument that the Mining Act and these regulations do no more than encourage mining subject to minimum federal environmental regulation, leaving the states free to condition the ability to mine on adhering to more stringent requirements. *See, e.g., State ex rel. Andrus v. Click*, 97 Idaho 791, ____, 554 P.2d 969, 974 (1976). On the other hand, we do not believe they go so far as to occupy the field of establishing environmental standards, striking a federally determined balance between encouraging mining and protecting the environment in national forests. The Forest Service regulations recognize that a state may enact environmental regulations in addition to those established by federal agencies. *See* 36 C.F.R. § 228.8 (1984); *see also* 16 U.S.C. § 551a. Moreover, a state may urge the Forest Service to withhold or revoke a federal mining permit from a miner who does not abide by all applicable state and federal standards. But an independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority and thus is preempted.

Our conclusion is bolstered by the fact that even the Forest Service is limited in the amount of regulation it may impose as a condition of mining in national forests because of the federal policy to encourage mining on federal lands. *See Weiss*, 642 F.2d at 299; *see also* 30 U.S.C. § 21a; 36 C.F.R. § 228.5(a) (1984). To allow a second tier of permit authority to be exercised by the states would undermine the Forest Service's ability to keep the applicable environmental requirements within the range of reasonableness. *See Weiss*, 642 F.2d at 299; 36 C.F.R. § 228.5(a) (1984). Current federal law allows the states to establish environmental standards that the Forest Service will apply in exercising its permit authority. *See id.* § 228.8. But by reserving final permit authority in the Forest Service, *see id.* §§ 228.4-.5, it also affords the Forest Service the power necessary to promote the federal

purpose of maintaining the reasonableness of the overall regulatory mix. *See* 30 U.S.C. § 21a; 36 C.F.R. § 228.5(a) (1984).

Our conclusion is not affected by the fact that the Forest Service staff stated in its environmental assessment of Granite Rock's plan of operation that "Granite Rock is responsible for obtaining any necessary permits which may be required by the California Coastal Commission." *Granite Rock*, 590 F.Supp. at 1374. A routine staff statement cannot change the effect of the formally adopted regulations.

REVERSED.

APPENDIX B

United States District Court
Northern District of California

No. C-83-5137-WWS

[Filed May 21, 1984]

Granite Rock Company, a corporation,
Plaintiff,

vs.

California Coastal Commission, an administration agency of the State of California, et al.,
Defendants.

MEMORANDUM OF OPINION AND ORDER

This action presents important questions of statutory interpretation and federal preemption arising from the interrelationship among two federal statutes, the Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.* ("CZMA") and the Mining Act of 1872, 30 U.S.C. §§ 21 *et seq.* ("Mining Act"), federal regulations issued by the National Forest Service, 36 C.F.R. §§ 228.1 *et seq.* (1983), and a state statute, the California Coastal Act, Cal. Pub. Res. Code §§ 30000 *et seq.* ("CCA"). At issue is whether plaintiff Granite Rock Company must secure a permit from the California Coastal Commission ("CCC") to implement its Plan of Operations, already approved by the Forest Service, for open-pit limestone mining on federally-owned property in Los Padres National Forest.

Plaintiff seeks (1) to enjoin defendant officials of the CCC from compelling it to comply with the permit requirement of the CCA and (2) to obtain corresponding declaratory relief under 28 U.S.C. § 2201. It claims that the CZMA, under the auspices of which the CCA was enacted, expressly excludes federally-owned lands from the coastal zone and that application of the CCA to its mining operations is preempted by the Mining Act and the Forest Service Regulations. Defendant CCC officials answer that the

CZMA and thus the CCA do not exclude land over which the federal government's discretion is limited by the unique property rights granted by the Mining Act to holders of patentable mining claims. Defendants further contend that the Mining Act cannot preempt the CCA which is enacted "pursuant to" the federal CZMA. Finally, they argue that even if all federal land is excluded from the coastal zone, neither the Mining Act nor the CZMA preempts the state's inherent police power to regulate private mining activity on federal land. Both parties agree that there are no material facts in dispute, and plaintiff has moved for summary judgment.

I. BACKGROUND.[1]

Because of the complex web of statutes and regulations at issue in this action, it is helpful at the outset to briefly note their major provisions.

A. The Mining Act.

The Mining Act grants private citizens the right to enter federal lands to explore for mineral deposits, *see* 30 U.S.C. § 22. Until a person has located a valuable mineral deposit, he has a limited possessory interest in the land he occupies against third parties but not against the United States; the government may bar entry to such person at any time. A person who locates a valuable mineral deposit acquires a significantly more substantial interest in the surface land as long as he properly stakes a claim and complies with other statutory requirements, *id.* § 26. For example, the claim holder must prepare locational records and must expend at least $100 of labor on the claim each year, *id.* § 28. If these requirements are met and the claim is thus perfected, its locator "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," *id.* § 26, even as against the United States which nevertheless retains title to the land.

---

[1] The CCC itself was originally named as a defendant but was dismissed by this Court based on its immunity from suit under the Eleventh Amendment. *See Alabama v. Pugh*, 438 U.S. 781 (1978).

Finally, the holder of a perfected mining claim may secure a patent to the land by demonstrating his location of a valuable mining claim and complying with other requirements of the Mining Act and regulations enacted thereunder, *see* 43 C.F.R. §§ 3861.1 *et. seq.* (1983), including payment to the government of $5.00 per acre, 30 U.S.C. § 29. If these requirements are satisfied, issuance by the government of a patent to the land is mandatory, and legal title passes to the patent-holder.

B. Forest Service Regulations.

Regulatory power over surface resources of national forest system land is granted to the Secretary of Agriculture by the Organic Administration Act of 1897, 16 U.S.C. § 471 ("OAA"). Pursuant to that authority, the National Forest Service, a branch of the Department of Agriculture, issued regulations in 1974 governing "use of the surface" of national forest system lands in connection with operations authorized by the Mining Act, 36 C.F.R. § 228.1 (1983). These regulations, which are designed to "minimize [the] adverse environmental impacts" of mining operations on forest land, require that holders of unpatented mining claims submit for approval by the District Ranger a Plan of Operations, *id.* § 228.4. In addition to describing precisely the scope of the intended operations, the Plan must demonstrate proposed compliance with applicable state and federal environmental standards relating to, among other things, air and water quality, solid waste disposal, preservation of scenic values, and fisheries and wildlife habitat maintenance, *id.* § 228.8. Operations are then to be conducted in accordance with the approved Plan, *id.* § 228.5.

C. The CZMA.

The CZMA, enacted in 1972 and amended in 1976, seeks to preserve and develop the nation's coastal zones, 16 U.S.C. §§ 1451-1452, by providing monetary assistance to states that develop and implement coastal Management Programs consistent with its standards, *id.*, §§ 1451, 1453(g). After the Secretary of Commerce has determined a state program to comply with the requirements set forth in the *CZMA*, *id.* §§ 1454-1455, the state

receives federal grants of up to 80% of the cost of administering its program, *id.* § 1455(a).

The CZMA envisions state management only of land use *within* the coastal zone: thus, "Management Program" is defined to include "standards to guide public and private uses of land and waters in the coastal zone," *id.* § 1453(12), "land use" is defined as "activities which are conducted in, or on the shorelands within, the coastal zone," *id.* § 1453(10), and the Management Programs are required to include "[a] definition of what shall constitute permissible land uses and water uses within the coastal zone . . ." *id.* 1454(b)(2). The "coastal zone" is defined in § 1453(1), the provision at issue in this action, to include coastal waters and adjacent shorelands but excludes "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents."

The Act also seeks to promote cooperation between federal and state agencies engaged in activities within or *affecting* the coastal zone. Thus, the CZMA requires a showing of "consistency" with state Management Programs of (1) activities conducted or supported by a Federal agency and "directly affecting the coastal zone," *id.* § 1456(c)(1), (2) development projects undertaken by a Federal agency in the coastal zone, *id.* § 1456(c)(2), and (3) activities for which a Federal permit or license is required and which affect land or water uses in the coastal zone, *id.* § 1456(c)(3)(A). Under the statutory scheme, for example, an activity outside of but affecting the coastal zone by a federal permittee would not be subject to direct regulation by the state's Management Program but would be subject to "consistency review" by the state under § 1456(c)(3)(A).

D. The CCA.

In 1976 the California legislature enacted the CCA which was approved by the Secretary of Commerce pursuant to the CZMA in 1977. Under the Act, a person wishing to undertake any "development," which is defined to include mining and construction, Cal. Pub. Res. Code § 30106, in the coastal zone must secure a permit from a local or regional commission of the CCC, *id.* § 30600. The permit shall be issued if the proposed development conforms with the requirements set forth in §§ 30200 *et. seq.* which address such concerns as ocean access, marine and land resources, and scenic and visual qualities. Moreover, the CCA provides that it shall constitute the state's Management Program for purposes of the CZMA,

> provided, however, that within federal lands excluded from the coastal zone pursuant to the Federal [CZMA], the State of California shall, consistent with applicable federal and state laws, continue to exercise the full range of powers, rights, and privileges it now possesses or which may be granted,

id. 30008.[2]

E. This Action.

Plaintiff is presently engaged in commercial mining of a valuable five to seven-acre quarry[3] of high calcium whiting grade limestone on and around Mount Pico Blanco in the Big Sur region of Los Padres National Forest. Although from 1959 to 1980, plaintiff removed relatively small samples of limestone for mineral analysis, it has been extracting substantial amounts since 1981 for purposes of resale to private purchasers. Its mining activity in Big Sur, conceded to be an area of great scenic beauty, includes blasting and opening a quarry, constructing and improving roads, building a bridge, boring test holes and conducting core drilling, improving a water storage system, and dumping rock waste in a disposal area.

Although plaintiff has not sought to acquire patents to the land, there is no dispute that it has perfected its mining claims on Mount Pico Blanco by locating a valuable mineral deposit, by

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[2] The provision when originally enacted in 1976 read:

> provided, however, that pursuant to the Federal [CZMA], excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the federal government, its officers or agents.

It was amended in 1978

[3] California estimates the value of this quarry at about $15,000.

complying with locational requirements, and by carrying out at least $100 worth of labor on the claims since 1959. Accordingly, as required by the Forest Service Regulations, plaintiff in 1981 submitted a Plan of Operations for approval by the District Ranger covering the period from 1981 to 1986.[4] In February 1981, after preparation of an Environmental Assessment, plaintiff's Plan was accepted with certain modifications regarding monitoring and mitigation measures and with the proviso that plaintiff be responsible "for obtaining any necessary permits required by State and/or county laws, regulations and/or ordinance."

Plaintiff's mining claims clearly lie within the geographic boundaries of the "coastal zone" as defined by the CZMA and the CCA. By a letter of October 17, 1983, the District Director of the CCC informed plaintiff that it needed to secure a permit for its mining operations from the CCC pursuant to the provisions of the CCA. The letter also stated that approval by the Forest Service constituted the granting of a federal permit within the meaning of § 1456(c)(3) of the CZMA and that the Plan of Operations for 1981-1986 was thus subject to "consistency review" by the CCC pursuant to that provision.

Plaintiff originally brought this action in October 1983 to enjoin the CCC's officials both from requiring a coastal development permit under the CCA and from requiring consistency review of its Plan of Operations under the CZMA. In its answer, defendants conceded that they had effectively waived the requirement of consistency review by waiting more than six months before notifying the Forest Service of any objections to its approval of the Plan, 16 U.S.C. § 1456(c)(3). Plaintiff now seeks to enjoin only enforcement of the permit requirement; defendants argue that the Court should find that any *future* Plan of Operations approved by the Forest Service or any amendments to the present Plan must be submitted for consistency review.

Although the parties diverge substantially in the way they frame the issues presented by this action in their papers, the

[4] No Plan of Operations was required for the "remov[al of] small samples or specimens" in which plaintiff was engaged from 1959 to 1980, 36 C.F.R. § 228.4(1)(ii)-(iii) (1983).

Court concludes that two principal questions are raised. First, does the exclusionary provision of § 1453(1) of the CZMA, incorporated by the CCA in Cal. Pub. Res. Code § 30008, extend to federal lands over which the federal government's discretion is limited by plaintiff's unpatented mining claims? If it does not, is the CCA permit requirement nevertheless preempted by the Mining Act or by the regulations issued by the Forest Service? Because the Court concludes that plaintiff's mining claims are not excluded from the coastal zone and that the CCA permit requirement is not preempted, it need not reach defendants' further contention that the permit requirement is a valid exercise of the state's inherent police power regardless of any exclusion under the CZMA. It also does not reach the applicability of the CZMA's "consistency review" provision to plaintiff's future Plans of Operations, an issue clearly not yet ripe for adjudication.

II. EXCLUSIONARY PROVISION OF 1453(1).

Whether the federal land on which plaintiff hold perfected mining claims under the Mining Act is excluded from the provisions of the CZMA and the CCA is a question of interpretation of § 1453(1) of the federal Act. In determining the scope of the exclusionary provision, the Court looks first to its language: "[i]f the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive,'" *United States v. Turkette*, 452 U.S. 576, 580 (1981), *citing Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

Section 1453(1) excludes from the "coastal zone" two categories of land: those "the use of which is by law subject *solely* to the discretion of . . . the Federal Government," (emphasis added), and those "the use of which . . . is held in trust by the Federal Government."[5] On its face, the first category does not include the land at issue here. Federal property encumbered by perfected

[5] The Court notes that the parties misread the provision to exclude "*lands* . . . which *is* held in trust by the Federal Government. . . ." (emphasis added). That reading is not grammatical. The correct and more reasonable reading is "lands *the use of which is* . . . held in trust by the Federal Government. . . ." (emphasis added).

mining claims is by law *not* subject solely to the government's discretion. The holder of such a claim has an exclusive possessory interest in the land, 30 U.S.C. § 26, *Union Oil Co. v. Smith*, 249 U.S. 337, 348-49 (1919): this "unique form of property," *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963), is "property in the fullest sense of that term," *Wilbur v. Krushnic*, 280 U.S. 306, 316-17 (1930), and cannot be taken by the United States without payment of compensation, *Freese v. United States*, 639 F.2d 754, 757 (Ct.Cl.), *cert. denied*, 454 U.S. 827 (1981).

Plaintiff argues that its interest in its unpatented mining claims on national forest land is subject to governmental discretion pursuant to the Forest Service Regulations. But those regulations do not, and under their enabling statute cannot, impermissibly encroach upon the right to exploit placer claims for mining purposes, *see* OAA, 16 U.S.C. § 478 ("Nor shall anything herein prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof."); *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981).

Similarly faulty is plaintiff's contention that the government wields discretion under the Surface Resources and Multiple Use Act of 1956, 30 U.S.C. §§ 612 *et. seq.* ("SRMUA"),[6] which

[6] Section 612 reads in pertinent part:

(a) Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto

(b) Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however*, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto. . . .

restricts use of mining claims to mining and incidental operations and grants the United States and its licensees the right to manage surface resources. *See* also 43 C.F.R. § 3712.1(b) (1983) (regulation by Bureau of Land Management ("BLM") implementing SRMUA). Although the SRMUA does "open up the public domain to greater, more varied uses," *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1285 (9th Cir. 1980) (SRMUA grants general public right of free access to land for recreational use of surface resources even where no federal permit required), the statute "was not intended . . . . to interfere with the historical relationship between the possessor of a mining claim and the United States," *id.* at 1281. Section 612(b) expressly provides that no use of surface resources by the United States or its licensees may materially interfere with mining or incidental operations, and a mining claimant can sue to enjoin any such interference, *Curtis-Nevada*, 611 F.2d at 1286. In light of the explicit reservation of rights under the Mining Act in the Forest Service Regulations and the SRMUA, it cannot be found that the United States has *sole* discretion over the use of lands subject to plaintiff's valid mining claims.[7]

Moreover, as holder of a valid mining claim, plaintiff need only comply with certain procedural requirements set forth in the Mining Act and regulations promulgated by the BLM, 43 C.F.R. §§ 3861.1 *et seq.* (1983), as well as pay a set fee of $5.00 per acre to acquire title to the land and thus withdraw it from regulation by

[7] Plaintiff also points to the Multiple Mineral Development Act of 1954, 30 U.S.C. §§ 521 *et seq.*, the Mining Claims Occupancy Act of 1954, *id.* §§ 701 *et seq.*, and the Mine Health and Safety Act, *id.* §§ 801 *et seq.* The first Act, however, merely provides for coordination of operations under federal mineral leases and unpatented mining claims and requires each to be conducted so as not to materially interfere with the other, *id.* § 526(b)-(c). The second Act authorizes the sale of federal land to qualified holders of unpatented mining claims found to be invalid. The third Act establishes mandatory health and safety standards for miners. None of these statutes bestows on the United States sole discretion over the use of federal land subject to valid mining claims.

the Forest Service and the SRMUA. Transfer of the property is *non-discretionary*: the government has no choice but to pass title upon tender of payment and procedural compliance, *see South Dakota v. Andrus*, 614 F.2d 1190, 1193 n.3 (8th Cir.), *cert. denied*, 449 U.S. 822 (1980) ("the actions taken by the Secretary of the Interior in processing an application for patent by such claimant are not discretionary; issuance of a patent can be compelled by court order"). Plaintiff's insistence that patent procurement may be complex, time-consuming and expensive is irrelevant to the question of governmental control: the special property interest created by the Mining Act in valid and patentable claims simply does not fit within § 1453(1)'s exclusion of lands subject to federal discretion.

Plaintiff also contends that its claims fall within the second prong of the exclusionary clause because historically the government holds *all* federal lands in trust for the people, *see, e.g., United States v. California*, 322 U.S. 19, 40 (1947); *Curtis-Nevada*, 611 F.2d at 1283; *United States v. Ruby Co.*, 588 F.2d 697, 704-05 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979). Defendants counter that the clause is a term of art for Indian lands "held in trust" by the United States pursuant to the unique fiduciary relationship between the Indians and the government, *see, e.g., United States v. Bowling*, 256 U.S. 484, 486-87 (1921); *United States v. Chase*, 245 U.S. 89, 99-100 (1917); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 666 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

The Court notes first that Congress has used the phrase "trust lands" with reference to Indian lands in a number of other federal statutes, *see* 16 U.S.C. § 583f ("trust or restricted Indian land"); 28 U.S.C. § 2409a (same). More significantly, plaintiff's reading would render the exclusionary clause redundant, and statutes should generally not be construed to render any provision surplusage, *Co Petro Marketing Group, Inc. v. Commodity Futures Trading Comm'n*, 680 F.2d 566, 569-70 (9th Cir. 1982). The category of lands subject to the *sole* discretion of the United States would be included within "lands held in trust" were that phrase interpreted to mean all federal lands. Surplusage is eliminated if the phrase is read to refer to Indian lands since they are

plainly not subject to the government's sole discretion, and the second clause then complements rather than subsumes the first. Plaintiff's mining claims are thus not excluded as lying on land held in trust by the Federal Government.

Even if the § 1453(1) exclusion is found to be ambiguous, consideration of the congressional intent behind and administrative interpretation of the provision leads to no contrary conclusion. From among the sparse references in the legislative history, plaintiff cites the statement in Conference Committee Report 92-1544, *reprinted in Congressional Research Service, Legislative History of the CZMA of 1972 as Amended* at 443, 455 (1976) (hereinafter *Legislative History*), that

> [t]he conferees also adopted the Senate language in this section which made it clear that Federal lands are not included within a State's coastal zone. As to the use of such lands which would affect a State's coastal zone, the provisions of section [1456(c)] would apply.

It also points to Congressman Mosher's observation that

> [t]he final version in no way affects the jurisdictional responsibilities of the [EPA], any other federal agency, or the Department of the Interior in regard to the administration of federal lands, since the conferees have specifically eliminated those land areas from the definition of coastal zone,

118 Cong. Rec. 35548 (Oct. 12, 1972).

Although the above references might suggest that § 1453(1) was intended to exclude all federal lands, it is clear from these and other statements and from the discernible objective of the exclusion that Congress sought to avert state interference with *federal use* of federal land and not with private activity subject to only limited government control. Senate Report No. 92-753, *reprinted in Legislative History*, *supra*, at 193, 200-01, notes that the Act does not "extend[ ] State authority to land subject solely to the discretion of the Federal Government such as national parks, forests, and wildlife refuges, Indian reservations and defense establishments." Moreover, Congressman Mosher's statement expresses concern that control by federal agencies not be

diminished: where private activity even on federal land is not subject to the discretion of some department or agency, the basis for the exclusion disappears. *See also* Sen. Rep. No. 91-1435, 91st Cong., 2d Sess. 38-39 ("Federal lands are excluded in order that the Federal Government's *independence in the management of its lands* will not be compromised." [emphasis added]).

Generalized references to "federal lands" were based on the assumption, almost always true, that the government wields sole discretion over the use of federal land: it is reasonable to conclude that public lands beyond the scope of federal control were not what the legislators had in mind. But the Mining Act creates precisely this kind of unanticipated use of federal land, a "unique form of property" to which the government holds nothing but legal title. Congress's concern with protecting "federal jurisdiction" is not advanced by excluding from state coastal regulation private activity that is not within the federal government's discretion to prevent.

This reading of the statutory history is buttressed rather than negated by the August 10, 1976, letter of the Assistant Attorney General, Office of Legal Counsel, United States Department of Justice, referred to in the regulations promulgated by the National Oceanic and Atmospheric Administration ("NOAA"), 15 C.F.R. §§ 920.1 *et seq.* (1984), pursuant to the CZMA and relied on by plaintiff, *see id.* § 920.2(b). Not only does the letter make clear that "lands held in trust" refers to Indian lands[8] but it expressly defines the "statutory test for exclusion" as "discretion regarding use of the land." Finally, plaintiff gains no additional support from the dictum in *Secretary of the Interior v. California*, ____U.S. ____, 104 S.Ct. 656, 662 (1984), that the "exclusion [reaches] federal parks, military installations, Indian reservations, and other federal lands that would lie within the coastal zone but for the fact of federal ownership." That decision concerned the "consistency review" provisions of the Act, and the Supreme Court merely assumed in passing that federally-owned land was

[8] The letter states at page 4: "*4. Trust lands.* Indian lands owned by the United States have been held to be owned in trust for Indian tribes or for individual Indians" (citations omitted).

subject to the government's sole discretion. As has been noted, that generally valid assumption does not apply to perfected mining claims under the Mining Act, and *Secretary of the Interior* cannot be read to the contrary.

In sum, the CZMA sought to encourage state management of activities within the nation's coastal regions. Although Congress stopped short of subjecting federal use of public lands to direct state regulation it did require that federally supported or licensed activity affecting the coastal zone be "consistent" with state Management Programs. But it did not mean to shield from direct state regulation purely private activity such as commercial mining operations on federal land which are not subject to ultimate federal control. Had it so wished, Congress could have simply excluded all federally-owned lands from the coastal zone. This it did not do, and if the "sole discretion" language of 1453(1) is not to be stripped of meaning, plaintiff's mining activity cannot be found to fall within its scope.[9]

III.
FEDERAL PREEMPTION.

Plaintiff argues that even if the coastal zone is held to include the federal lands subject to its mining claims, regulation pursuant to the CCA, a state statute, is preempted by the federal Mining Act and the Forest Service regulations. Defendants respond

[9] The argument that activities subject to consistency review under the CZMA and to direct regulation under a state's Management Program are mutually exclusive and that its Plan of Operations cannot be subject to both is without merit. First, the Court does not here reach the issue of whether plaintiff must submit its Plan of Operations to consistency review under § 1456(c)(3)(A). Second, nothing in the statutory language supports plaintiff's reading. Activity by a federal licensee in a state coastal zone, for example, would clearly be subject to both kinds of regulation. The consistency review provision is somewhat broader than direct state regulation because it applies to activities affecting the coastal zone and somewhat narrower because it applies only to federally supported or licensed activities. But there is no basis for finding that an activity subject to consistency review is for that reason alone shielded from direct state regulation.

merely that there is no state-federal conflict because the CZMA "converts the state Coastal Act into a federal standard that has the dignity of federal law in a cooperative federalism program," Def's Brief at 14.

Defendants misconceive the "cooperative" scheme established by the CZMA. The Act encourages state regulation of the coastal zone by granting funds for the implementation of approved state programs and subjecting activities affecting the coastal zone by federal agencies and licensees to "consistency review" under § 1456. It does not otherwise federalize states' Management Programs. There is no doubt that Congress can, if it so chooses, enact federal requirements which incorporate state regulatory standards, *see, e.g., Chevron, U.S.A., Inc. v. Hammond*, 726 F.2d 483, 489-90 (9th Cir. 1984) (Clean Water Act adopts state permit requirements), but nothing in the CZMA or in the NOAA's regulations purports to "convert" state Management Programs into federally mandated standards. Rather, the Statement of Congressional Findings "encourage(s) the states to exercise *their full authority* over the lands and waters in the coastal zone . . . ," 16 U.S.C. § 1451(i). In return for developing programs consistent with federal policies and in accordance with the recommendations of federal agencies, states are granted monetary assistance and "consistency review" power over federal agencies' and licensees' activities; they are not cloaked with federal authority to directly regulate private activity by instituting permit requirements in conflict with federal statutes or violative of federally-bestowed rights.

Moreover, the CZMA no where provides for preemption of conflicting federal laws even with regard to its "consistency review" provisions. Rather, § 1456(e)(2) provides that the Act shall not be construed as "superseding, modifying or repealing existing laws applicable to the various Federal agencies. . . ." With regard to this provision, Congressman Mosher stated categorically that the Act "does not supersede, modify or repeal existing federal law," 118 Cong. Rec. 26479 (Aug. 2, 1972). Thus, defendants can hardly rely on the CZMA to argue that its state-enacted Management Program necessarily trumps federal rights granted under the Mining Act.

That the CZMA does not give preclusive federal effect to the state's Management Program does not compel the conclusion, however, that the Mining Act preempts the CCA's permit requirement. Plaintiff bases its claim of federal preemption essentially on three grounds. First, it argues that, as a general rule, states may not regulate activities conducted wholly on federal property. Second, it contends that even if the State retains legislative jurisdiction over federal forest lands, the Mining Act preempts regulation of its mining operations. Finally, it claims that the approval required by the Forest Service pursuant to its jurisdiction over the national forests under the OAA "occupies the field" of mining regulation and displaces both parallel and conflicting state requirements.

A. Federal Enclaves.

Pursuant to Article I, § 8, cl. 17 of the Constitution, the federal government can acquire exclusive or partial legislative jurisdiction by consensual acquisition of land or by a state's subsequent cession of authority, *Paul v. United States*, 371 U.S. 245, 265 (1963). With regard to such federal enclaves, "where 'Congress does not affirmatively declare its instrumentalities or property subject to regulation,' 'the federal function must be left free' of regulation," *Hancock v. Train*, 426 U.S. 167, 179 (1976). *See also EPA v. State Water Resources Control Board*, 426 U.S. 200, 211 (1976).

Plaintiff does not, and cannot, assert, however, that its mining operations on federal land somehow convert it into a federal instrumentality. Nor does plaintiff claim that the national forest on which its mining claims lie is a "federal enclave" comparable to a fort or military reservation and subject solely to federal legislative jurisdiction. *See, e.g., United States v. County of Fresno*, 429 U.S. 452, 455 (1977) (states retain civil and criminal jurisdiction over national forests); *United States v. California*, 655 F.2d 914, 919 (9th Cir. 1980). There is, therefore, no presumption that state regulation of plaintiff's mining operations is pre-

empted merely because they are conducted on federal land, and the *Hancock* line of cases cited by plaintiff is inapplicable.

B. Mining Act.

Plaintiff next argues that although the state may retain legislative jurisdiction over federal lands within its territory, "Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause" of the Federal Constitution, Article IV, § 3, cl. 2, *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) (upholding constitutionality of The Wild Free-roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340, under the Property Clause). It is pursuant to the Property Clause that Congress enacted the Mining Act which necessarily overrides conflicting state laws under the Supremacy Clause: "a different rule would place the public domain of the United States completely at the mercy of state legislation," *Camfield v. United States*, 167 U.S. 518, 526 (1897).

Preemption of state law by federal statute is not to be presumed, however, absent "persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained," *Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). Federal law preempts only those state statutes that "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Perez v. Campbell*, 402 U.S. 637, 649 (1971); *Hines v. Davidowitz* 312 U.S. 52, 67 (1941). Plaintiff thus argues not that the Mining Act precludes states from any regulation of its mining operations, but that the CCA's permit requirement amounts to a "veto power" over its federally authorized activities and thus an obstacle to congressional objectives. The Court does not agree.

Plaintiff relies primarily on the Ninth Circuit's decision in *Ventura County v. Gulf Oil Corporation*, 601 F.2d 1080 (9th Cir. 1979), *aff. mem.*, 445 U.S. 947 (1980). There the BLM had leased to defendant 120 acres within Los Padres National Forest for oil drilling pursuant to the Mineral Lands Leasing Act of 1920, 30 U.S.C. 181 *et seq.* Plaintiff County sued to enjoin

defendant from drilling an oil well pursuant to its lease and approval by various federal agencies unless it secured an Open Zone Use permit from the County Planning Commission pursuant to local ordinance. The Court affirmed dismissal of the action on the ground that

> [t]he federal Government has authorized a specific use of federal lands, and [the County] cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.

601 F.2d at 1084. The County's argument that no conflict between federal and state law had yet arisen since it had not yet denied a permit was rejected as inconsistent with its request for an injunction:

> [t]he issue is whether [the County] has the power of ultimate control over the Government's lessee, and this issue persists whether or not a use permit would eventually be granted.

601 F.2d at 1085. Thus the Court invalidated what it characterized as "a local veto power," *id.* at 1086. *See also Brubaker v. Board of County Comm'rs*, 652 P.2d 1050 (Col. 1982) (Mining Act preempts County's requirement of special use permit for test drilling which had been denied).

Defendants argue that *Ventura* is distinguishable because the County there had sought to prohibit or veto rather than merely to regulate federally authorized activity. Plaintiff's reading of *Ventura* to equate any permit requirement at all to a "veto power" is cast into doubt, defendants contend, by subsequent Supreme Court decisions rejecting facial challenges to state regulatory schemes absent concrete allegations that the regulations will necessarily be unconstitutionally applied, *see, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

Defendants' contention is buttressed by the Ninth Circuit's more recent holding in *United States v. Weiss*, *supra*, that regulations promulgated by the Forest Service concerning unpatented mining claims did not impermissibly encroach on rights

granted by the Mining Act. Citing *Agins*, the Court emphasized that "the reasonableness of the regulations has not been put in issue. Although authority exists for the promulgation of regulations, those regulations may, nevertheless, be struck down when they do operate to accomplish the statutory purpose or where they encroach upon other statutory rights. *Appellants have not attempted to comply with the regulations; therefore, those issues are not before us on appeal*," 642 F.2d at 299 n.5 (emphasis added).

The Court agrees that, in light of *Weiss*, *Ventura* does not compel a finding that defendants' permit requirement necessarily clashes with rights granted under the Mining Act. The CCC seeks not to prohibit or "veto," but to regulate plaintiff's mining activity in accordance with the detailed requirements of the CCA. Unlike in *Ventura* where zoning permits could be "issued on whatever conditions Ventura determines appropriate, or . . . may never [be] issued at all," 601 F.2d 1084, here the CCA provides for permit issuance upon compliance with regulatory requirements comparable to those of the Forest Service and approved in *Weiss*. There is no reason to find that the CCC will apply the CCA's regulations so as to deprive plaintiff of its rights under the Mining Act; if and when that comes to pass, plaintiffs can then seek to enjoin their enforcement.

In sum, the right of states to regulate mining operations on federal land has long been recognized, *see Butte City Water Co. v. Baker*, 196 U.S. 119, 123-25 (1905)(upholding Montana law prescribing mining claim location requirements). As long as the state's permit requirement does not render plaintiff's exercise of rights under the Mining Act impossible, no impermissible conflict exists and plaintiff's facial challenge to the CCA's provisions must fail. See *State ex rel Andrus v. Click*, 554 P.2d 969, 974 (Idaho 1976); *Brubaker*, 652 P.2d at 1059 ("[s]tate and local laws that merely impose reasonable conditions upon the use of federal lands may be enforceable, particularly where they are directed to environmental protection concerns").

C. Forest Service Regulations.

Finally, plaintiff claims that the regulations issued by the Forest Service which require federal approval of mining Plans of Operations preempt the CCA's permit regulation. Federal regulations such as those of the Forest Service may preempt parallel state regulation in two ways. First they may be found to "occupy the field" of regulation of a particular activity in light of such factors as congressional intent, comprehensiveness of the federal regulations, and need for uniform regulation, *see Chevron*, 726 F.2d at 486. Second, a conflict may be found where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers*, 373 U.S. at 142-43, or where the state regulation presents an obstacle to achievement of the purpose of the federal regulation, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1970). Undertaking this two-tier inquiry recently embraced by the Supreme Court, *see Silkwood v. Kerr-McGee Corp.*, ____ U.S. ____, 104 S.Ct. 615, 621 (1984), and employed by the Ninth Circuit, *see Chevron*, 726 F.2d at 486 & n.4, the Court concludes that the Forest Service regulations do not preempt the CCA's permit requirement.

1. Occupying the Field.

The Forest Service regulations, as has been noted, were enacted pursuant to the OAA which seeks to preserve the nation's forests from "destruction . . . and depredation," 16 U.S.C. § 551. Not only does nothing in the statutory language evince an intent to occupy the field of mining regulation on federal forest land but § 480 specifically provides

> The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence. . . .

Moreover, the regulations promulgated by the Forest Service explicitly require compliance with applicable state standards for air quality, water quality, solid waste disposal and other environmental concerns.

Plaintiff points to no legislative history indicating that either Congress or the Forest Service intended to occupy the field of

mining regulation on national forest land. Nor can the Court imagine any reason for insisting on uniform regulation of the environmental impact of mining operations on forest land in different states, especially in light of the Forest Service's explicit incorporation of state standards in its regulations. The Court thus concludes that to invalidate the CCA's permit requirement as applied to plaintiff's mining operation would frustrate the clear intent of Congress and the Service that there be "collaborative federal/state efforts" to protect public forests.

2. Conflict.

The inquiry thus becomes whether there is an irreconcilable conflict, *Kerr*, 104 S.Ct. at 626, between the Forest Service Regulations and the CCA's permit requirement, keeping in mind the "sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties," *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973). Plaintiff points to and the Court finds no such irreconcilable conflict.

To begin with, the legislative objectives of the federal and state regulations do not clash but are instead analogous, *Kewanee Oil v. Bicron Corp.*, 416 U.S. 470 (1974). The purpose of both is to "minimize adverse environmental impacts" on National Forest System surface resources, 36 C.F.R. § 228.1 (1983), and in the coastal zone, Cal. Pub. Res. Code §§ 30001-30004. Moreover, until 1974 the Forest Service had no permit requirement; thus, as in *Chevron*, 726 F.2d at 497, the history of federal regulation "demonstrates increasingly stringent protection" of forest land subject to mining claims.

Furthermore, plaintiff cannot claim that the CCA permit in any way prevents it from compliance with the federal regulations. Instead, the CCA is more restrictive than the Forest Service regulations. But, absent explicit preemptive intent, *Chevron*, 726 F.2d at 498 n.19, "the possibility of proscription by California of conduct that federal law might permit is not sufficient to warrant preemption," *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1049 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

Finally, the Court notes that the Forest Service's Environmental Assessment of plaintiff's Plan of Operations expressly stated that

> Granite Rock is responsible for obtaining any necessary permits which may be required by the California Coastal Commission.

Although the Forest Service is plainly not empowered to grant the State permit authority otherwise preempted by federal law, here it is the Forest Service itself which is alleged to have preempted the CCA. Its own requirement of compliance with the CCA's permit requirement is clear evidence that the federal regulations relied on here were not intended to preempt, and do not conflict with, the CCA.

IV. CONCLUSION.

Because the Court concludes that the CCA requires plaintiff to secure a permit from the CCC for its mining operations and that the permit requirement is not federally preempted, it need not address defendants' arguments based on California's inherent police power.

Moreover, defendants' contention that plaintiff's future Plans of Operations are subject to consistency review pursuant to § 1456(c)(3)(A) is clearly not adjudicable at this time. Plaintiff concedes that it intends to file additional Plans with the Forest Service, that it intends to continue mining as long as it is economically viable under federal laws, and that its current reserves of limestone indicate future operations in excess of fifty years on a quarry of up to 20 acres. Plaintiff has submitted no further Plans, however, nor has it been granted any additional approvals by the Forest Service. Its contention now that it will not seek consistency review if and when it does submit additional plans does not suffice to create a case or controversy cognizable in this Court. In any case, plaintiff now seeks only a declaratory judgment as to the CCA's permit requirement inasmuch as defendants admit to having waived consistency review of the present Plan. Consistency review is thus no longer at issue.

Accordingly, plaintiff's motion for summary judgment is denied. The Court having determined that plaintiff is not entitled to relief, judgment dismissing the action will be entered.

IT IS SO ORDERED.

DATED: May 21, 1984

/s/ William W. Schwarzer
United States District Judge

United States District Court
Northern District of California

No. C-83-5137 WWS

[Filed May 21, 1984]

Granite Rock Company,
Plaintiff,

vs.

California Coastal Commission,
Defendants.

JUDGMENT IN A CIVIL CASE

The Court having considered the pleadings and the matter having been duly submitted;

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Plaintiff's motion for summary judgment is denied.

2. Judgment dismissing the action shall be entered accordingly.

3. The parties shall bear their own costs.

William L. Whittaker
Clerk

By: /s/ Florence Keane Walsh
Deputy Clerk

(Entered in Civil Docket May 22, 1984)

APPENDIX C

United States Court of Appeals
For the Ninth Circuit

No. 84-2146
D.C. No. CV 83-5137 WWS

[Filed October 17, 1985]

Granite Rock Company, a corporation,
Plaintiff-Appellant,

vs.

California Coastal Commission, an Administrative Agency of the State of California,
Defendant-Appellee.

ORDER

Appeal from the United States District Court
for the Northern District of California

Before: WALLACE and POOLE, Circuit Judges, and STEPHENS,* District Judge.

The panel, as constituted above, has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

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* Honorable Albert Lee Stephens, Jr., United States District Judge, Central District of California, sitting by designation.

APPENDIX D

In the United States Court of Appeals
For the Ninth Circuit

No. 84-2146
D.C. No. C-83-5137 WWS

[Filed Nov. 8, 1985]

Granite Rock Company, a corporation,
Plaintiff and Appellant,

vs.

California Coastal Commission, et al.,
Defendants and Appellees,

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the members of the California Coastal Commission, defendants and appellees above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on August 14, 1985. The Court of Appeals denied appellees' timely petition for rehearing and rehearing en banc on October 17, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED: November 8, 1985

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Attorney General of the
State of California

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and Appellees

APPENDIX E

MINING LAW PROVISIONS, TITLE 30, U.S. CODE

§ 22. Lands open to purchase by citizens

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

§ 26. Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

§ 28. Mining district regulations by miners: location, recordation, and amount of work; marking of location on ground; records; annual labor or improvements on claims pending issue of patent; coowner's succession in interest upon delinquency in contributing proportion of expenditures; tunnel as lode expenditure

The miners of each district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several coowners to contribute his proportion of the expenditures required hereby, the coowners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent coowner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his coowners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the lst day of September succeeding the date of location of such claim.

Where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since May 10, 1872; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by this section. On all such valid claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922.

§ 29. Patents; procurement procedure; filing: application under oath, plat and field notes, notices, and affidavits; posting plat and notice on claim; publication and posting notice in office; certificate; adverse claims; payment per acre; objections; non-resident claimant's agent for execution of application and affidavits

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter and sections 71 to 76 of this title, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter and sections 71 to 76 of this title, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States Chief Cadastral Engineer, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such

notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The manager of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the Manager a certificate of the United States Chief Cadastral Engineer that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to a natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the Manager of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of $5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter and sections 71 to 76 of this title. Where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits.

§ 37. Same; proceeding for patent where boundaries contain vein or lode; application; statement including vein or lode; issuance of patent: acreage payments for vein or lode and placer claim; costs of proceedings; knowledge affecting construction of application and scope of patent

Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter and sections 71 to 76 of this title, including such vein or lode, upon the payment of $5 per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of $2.50 per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section 23 of this title, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

§ 38. Evidence of possession and work to establish right to patent

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficent to establish a right to a patent thereto under this chapter and sections 71 to 76 of this title, in the absence of any adverse claim; but nothing in this chapter and sections 71 to 76 of this title shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

§ 43. Conditions of sale by local legislature

As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

APPENDIX F

FOREST SERVICE REGULATIONS
36 C.F.R. SECTIONS 228.1 to 228.15 (1985)
Subpart A—Locatable Minerals

§ 228.1 Purpose.

It is the purpose of these regulations to set forth rules and procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws (30 U.S.C. 21-54), which confer a statutory right to enter upon the public lands to search for minerals, shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources. It is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior.

§ 228.2 Scope.

These regulations apply to operations hereafter conducted under the United States mining laws of May 10, 1872, as amended (30 U.S.C. 22 et seq.) as they affect surface resources on all National Forest System lands under the jurisdiction of the Secretary of Agriculture to which such laws are applicable: Provided, however, That any area of National Forest lands covered by a special Act of Congress (16 U.S.C. 482a-482q) is subject to the provisions of this part and the provisions of the special act, and in the case of conflict the provisions of the special act shall apply.

§ 228.3 Definitions.

For the purposes of this part the following terms, respectively, shall mean:

(a) Operations. All functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to the regulations in this part, regardless of whether said operations take place on or off mining claims.

(b) Operator. A person conducting or proposing to conduct operations.

(c) Person. Any individual, partnership, corporation, association, or other legal entity.

(d) Mining claim. Any unpatented mining claim or unpatented millsite authorized by the United States mining laws of May 10, 1872, as amended (30 U.S.C. 22 et seq.).

(e) Authorized officer. The Forest Service officer to whom authority to review and approve operating plans has been delegated.

§ 228.4 Plan of operations—notice of intent—requirements

(a) Except as provided in paragraph (a)(2) of this section, a notice of intention to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources. Such notice of intention shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. If the District Ranger determines that such operations will likely cause significant disturbance of surface resources, the operator shall submit a proposed plan of operations to the District Ranger.

(1) The requirements to submit a plan of operations shall not apply: (i) To operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest purposes, (ii) to individuals desiring to search for and occasionally remove small mineral samples or specimens, (iii) to prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study, (iv) to marking and monumenting a mining claim and (v) to subsurface operations which will not cause significant surface resource disturbance.

(2) A notice of intent need not be filed: (i) Where a plan of operations is submitted for approval in lieu thereof, (ii) for operations excepted in paragraph (a)(1) of this section from the requirement to file a plan of operations, (iii) for operations which will not involve the use of mechanized earthmoving equipment

such as bulldozers or backhoes and will not involve the cutting of trees. Each notice of intent to operate shall provide information sufficient to identify the area involved, the nature of the proposed operations, the route of access to the area of operations and the method of transport. If a notice of intent is filed, the District Ranger will, within 15 days of receipt thereof, notify the operator whether a plan of operations is required.

(b) Any person conducting operations on the effective date of these regulations, who would have been required to submit a plan of operations under § 228.4(a), may continue operations but shall within 120 days thereafter submit a plan of operations to the District Ranger having jurisdiction over the area within which operations are being conducted: Provided, however, That upon a showing of good cause the authorized officer will grant an extension of time for submission of a plan of operations, not to exceed an additional 6 months. Operations may continue according to the submitted plan during its review, unless the authorized officer determines that the operations are unnecessarily or unreasonably causing irreparable damage to surface resources and advises the operator of those measures needed to avoid such damage. Upon approval of a plan of operations, operations shall be conducted in accordance with the approved plan. The requirement to submit a plan of operations shall not apply: (1) To operations excepted in § 228.4(a) or (2) to operations concluded prior to the effective date of the regulations in this part.

(c) The plan of operations shall include:

(1) The name and legal mailing address of the operators (and claimants if they are not the operators) and their lessees, assigns, or designees.

(2) A map or sketch showing information sufficient to locate the proposed area of operations on the ground, existing and/or proposed roads or access routes to be used in connection with the operations as set forth in § 228.12 and the approximate location and size of areas where surface resources will be disturbed.

(3) Information sufficient to describe or identify the type of operations proposed and how they would be conducted, the type and standard of existing and proposed roads or access routes, the

means of transportation used or to be used as set forth in § 228.12, the period during which the proposed activity will take place, and measures to be taken to meet the requirements for environmental protection in § 228.8.

(d) The plan of operations shall cover the requirements set forth in paragraph (c) of this section, as foreseen for the entire operation for the full estimated period of activity: Provided, however, that if the development of a plan for an entire operation is not possible at the time of preparation of a plan, the operator shall file an initial plan setting forth his proposed operation to the degree reasonably foreseeable at that time, and shall thereafter file a supplemental plan or plans whenever it is proposed to undertake any significant surface disturbance not covered by the initial plan.

(e) At any time during operations under an approved plan of operations, the authorized officer may ask the operator to furnish a proposed modification of the plan detailing the means of minimizing unforeseen significant disturbance of surface resources. If the operator does not furnish a proposed modification within a time deemed reasonable by the authorized officer, the authorized officer may recommend to his immediate superior that the operator be required to submit a proposed modification of the plan. The recommendation of the authorized officer shall be accompanied by a statement setting forth in detail the supporting facts and reasons for his recommendations. In acting upon such recommendation, the immediate superior of the authorized officer shall determine: (1) Whether all reasonable measures were taken by the authorized officer to predict the environmental impacts of the proposed operations prior to approving the operating plan, (2) whether the disturbance is or probably will become of such significance as to require modification of the operating plan in order to meet the requirements for environmental protection specified in § 228.8 and (3) whether the disturbance can be minimized using reasonable means. Lacking such determination that unforeseen significant disturbance of surface resources is occurring or probable and that the disturbance can be minimized using reasonable means, no operator shall be required to submit a proposed modification of an approved plan of operations. Opera-

tions may continue in accordance with the approved plan until a modified plan is approved, unless the immediate superior of the authorized officer determines that the operations are unnecessarily or unreasonably causing irreparable injury, loss or damage to surface resources and advises the operator of those measures needed to avoid such damage.

(f) Upon completion of an environmental analysis in connection with each proposed operating plan, the authorized officer will determine whether an environmental statement is required. Not every plan of operations, supplemental plan or modification will involve the preparation of an environmental statement. Environmental impacts will vary substantially depending on whether the nature of operations is prospecting, exploration, development, or processing, and on the scope of operations (such as size of operations, construction required, length of operations and equipment required), resulting in varying degrees of disturbance to vegetative resources, soil, water, air, or wildlife. The Forest Service will prepare any environmental statements that may be required.

§ 228.5 Plan of operations—approval

(a) Operations shall be conducted in accordance with an approved plan of operations, except as provided in paragraph (b) of this section and in § 228.4(a), (b), and (e). A proposed plan of operation shall be submitted to the District Ranger, who shall promptly acknowledge receipt thereof to the operator. The authorized officer shall, within thirty (30) days of such receipt, analyze the proposal, considering the economics of the operation along with the other factors in determining the reasonableness of the requirements for surface resources protection, and;

(1) Notify the operator that he has approved the plan of operations; or

(2) Notify the operator that the proposed operations are such as not to require an operating plan; or

(3) Notify the operator of any changes in, or additions to, the plan of operations deemed necessary to meet the purpose of the regulations in this part; or

(4) Notify the operator that the plan is being reviewed, but that more time, not to exceed an additional sixty (60) days, is necessary to complete such review, setting forth the reasons why additional time is needed: Provided, however, that days during which the area of operations is inaccessible for inspection shall not be included when computing the sixty (60) day period; or

(5) Notify the operator that the plan cannot be approved until a final environment statement has been prepared and filed with the Council on Environmental Quality as provided in § 228.4(f).

(b) Pending final approval of the plan of operations, the authorized officer will approve such operations as may be necessary for timely compliance with the requirements of Federal and State laws, so long as such operations are conducted so as to minimize environmental impacts as prescribed by the authorized officer in accordance with the standards contained in § 228.8.

(c) A supplemental plan or plans of operations provided for in § 228.4(d) and a modification of an approved operating plan as provided for in § 228.4(e) shall be subject to approval by the authorized officer in the same manner as the initial plan of operations: Provided, however, That a modification of an approved plan of operations under § 228.4(e) shall be subject to approval by the immediate superior of the authorized officer in cases where it has been determined that a modification is required.

(d) In the provisions for review of operating plans, the Forest Service will arrange for consultation with appropriate agencies of the Department of the Interior with respect to significant technical questions concerning the character of unique geologic conditions and special exploration and development systems, techniques, and equipment, and with respect to mineral values, mineral resources, and mineral reserves. Further, the operator may request the Forest Service to arrange for similar consultations with appropriate agencies of the U.S. Department of the Interior for a review of operating plans.

§ 228.6. Availability of information to the public.

Except as provided herein, all information and data submitted by an operator pursuant to the regulations in this part shall be available for examination by the public at the Office of the District Ranger in accordance with the provisions of 7 CFR 1.1-1.6 and 36 CFR 200.5-200.10. Specifically identified information and data submitted by the operator as confidential concerning trade secrets or privileged commercial or financial information will not be available for public examination. Information and data to be withheld from public examination may include, but is not limited to, known or estimated outline of the mineral deposits and their location, attitude, extent, outcorps, and content, and the known or planned location of exploration pits, drill holes, excavations pertaining to location and entry pursuant to the United States mining laws, and other commercial information which relates to competitive rights of the operator.

§ 228.7 Inspection, noncompliance.

(a) Forest Officers shall periodically inspect operations to determine if the operator is complying with the regulations in this part and an approved plan of operations.

(b) If an operator fails to comply with the regulations or his approved plan of operations and the noncompliance is unnecessarily or unreasonably causing injury, loss or damage to surface resources the authorized officer shall serve a notice of noncompliance upon the operator or his agent in person or by certified mail. Such notice shall describe the noncompliance and shall specify the action to comply and the time within which such action is to be completed, generally not to exceed thirty (30) days: Provided, however, That days during which the area of operations is inaccessible shall not be included when computing the number of days allowed for compliance.

§ 228.8. Requirements for environmental protection.

All operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources, including the following requirements:

(a) Air Quality. Operator shall comply with applicable Federal and State air quality standards, including the requirements of the Clean Air Act, as amended (42 U.S.C. § 1857 et seq.).

(b) Water Quality. Operator shall comply with applicable Federal and State water quality standards, including regulations issued pursuant to the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151 et seq.).

(c) Solid Wastes. Operator shall comply with applicable Federal and State standards for the disposal and treatment of solid wastes. All garbage, refuse, or waste, shall either be removed from National Forest lands or disposed of or treated so as to minimize, so far as is practicable, its impact on the environment and the forest surface resources. All tailings, dumpage, deleterious materials, or substances and other waste produced by operations shall be deployed, arranged, disposed of or treated so as to minimize adverse impact upon the environment and forest surface resources.

(d) Scenic Values. Operator shall, to the extent practicable, harmonize operations with scenic values through such measures as the design and location of operating facilities, including roads and other means of access, vegetative screening of operations, and construction of structures and improvements which blend with the landscape.

(e) Fisheries and Wildlife Habitat. In addition to compliance with water quality and solid waste disposal standards required by this section, operator shall take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations.

(f) Roads. Operator shall construct and maintain all roads as to assure adequate drainage and to minimize or, where practicable, eliminate damage to soil, water, and other resource values. Unless otherwise approved by the authorized officer, roads no longer needed for operations: (1) Shall be closed to normal vehicular traffic, (2) bridges and culverts shall be removed, (3) cross drains, dips, or water bars shall be constructed, and (4) the road surface shall be shaped to as near a natural contour as practicable and be stabilized.

(g) Reclamation. Upon exhaustion of the mineral deposit or at the earliest practicable time during operations, or within 1 year of the conclusion of operations, unless a longer time is allowed by the authorized officer, operator shall, where practicable reclaim the surface disturbed in operations by taking such measures as will prevent or control onsite and off-site damage to the environment and forest surface resources including:

(1) Control of erosion and landslides;

(2) Control of water runoff;

(3) Isolation, removal or control of toxic materials;

(4) Reshaping and revegetation of disturbed areas, where reasonably practicable; and

(5) Rehabilitation of fisheries and wildlife habitat;

(h) Certification or other approval issued by State agencies or other Federal agencies of compliance with laws and regulations relating to mining operations will be accepted as compliance with similar or parallel requirements of these regulations.

§ 228.9 Maintenance during operations, public safety.

During all operations operator shall maintain his structures, equipment, and other facilities in a safe, neat and workmanlike manner. Hazardous sites or conditions resulting from operations shall be marked by signs, fenced or otherwise identified to protect the public in accordance with Federal and State laws and regulations.

§ 228.10 Cessation of operations, removal of structures and equipment.

Unless otherwise agreed to by the authorized officer, operator shall remove within a reasonable time following cessation of operations all structures, equipment and other facilities and clean up the site of operations. Other than seasonally, where operations have ceased temporarily, an operator shall file a statement with the District Ranger which includes: (a) Verification of intent to maintain the structures, equipment and other facilities, (b) the expected reopening date, and (c) an estimate of extended duration of operations. A statement shall be filed every year in the

event operations are not reactivated. Operator shall maintain the operating site, structures, equipment and other facilities in a neat and safe condition during nonoperating periods.

§ 228.11 Prevention and control of fire.

Operator shall comply with all applicable Federal and State fire laws and regulations and shall take all reasonable measures to prevent and suppress fires on the area of operations and shall require his employees, contractors and subcontractors to do likewise.

§ 228.12 Access.

An operator is entitled to access in connection with operations, but no road, trail, bridge, landing area for air craft, or the like, shall be constructed or improved, nor shall any other means of access, including but not limited to off-road vehicles, be used until the operator has received approval of an operating plan in writing from the authorized officer when required by § 228.4(a). Proposals for construction, improvement or use of such access as part of a plan of operations shall include a description of the type and standard of the proposed means of access, a map showing the proposed route of access, and a description of the means of transportation to be used. Approval of the means of such access as part of a plan of operations shall specify the location of the access route, design standards, means of transportation, and other conditions reasonably necessary to protect the environment and forest surface resources, including measures to protect scenic values and to insure against erosion and water or air pollution.

§ 228.13 Bonds.

(a) Any operator required to file a plan of operations shall, when required by the authorized officer, furnish a bond conditioned upon compliance with § 228.8(g), prior to approval of such plan of operations. In lieu of a bond, the operator may deposit into a Federal depository, as directed by the Forest Service, and maintain therein, cash in an amount equal to the required dollar amount of the bond or negotiable securities of the United States having market value at the time of deposit of not less than the required dollar amount of the bond. A blanket bond covering

nationwide or statewide operations may be furnished if the terms and conditions thereof are sufficient to comply with the regulations in this part.

(b) In determining the amount of the bond, consideration will be given to the estimated cost of stabilizing, rehabilitating, and reclaiming the area of operations.

(c) In the event that an approved plan of operations is modified in accordance with § 228.4(d) and (e), the authorized officer will review the initial bond for adequacy and, if necessary, will adjust the bond to conform to the operations plan as modified.

(d) When reclamation has been completed in accordance with § 228.8(g), the authorized officer will notify the operator that performance under the bond has been completed: Provided, however, That when the Forest Service has accepted as completed any portion of the reclamation, the authorized officer shall notify the operator of such acceptance and reduce proportionally the amount of bond thereafter to be required with respect to the remaining reclamation.

§ 228.14 Appeals.

(a) Any operator aggrieved by a decision of the authorized officer in connection with the regulations in this part may file with the authorized officer a written statement setting forth in detail the respects in which the decision complained of is contrary to, or in conflict with, the facts, the law, or the regulations of the Secretary, or is otherwise in error. No such appeal will be considered unless it is filed with the authorized officer within thirty (30) days after the date of notification to the operator of the action or decision complained of. Upon receipt of appellant's statement, the authorized officer shall promptly prepare his own statement explaining his decision and the reasons therefor and forward the statements and record to his immediate superior for review and decision. The decision of the Regional Forester shall be the final administrative appeal decision.

(b) At the time appellant files his written statement of appeal he may request and shall be afforded an opportunity to present his views orally to the reviewing Forest Service officer.

(c) If the reviewing Forest Service officer considers the record inadequate to support a decision on the appeal, he may provide for the production of such additional evidence or information as may be appropriate or may remand the case with appropriate instructions for further action.

(d) The official files of the Forest Service relating to these appeals and any testimony and documents submitted by the parties on which the decision of the authorized officer was based constitute the record in the appeal. The authorized officer shall maintain the record under separate cover and shall certify that it is the record on which his decision was based at the time it is forwarded to his immediate superior for review. The Forest Service shall make the record available to the appellant upon request.

(e) On or before the expiration of forty-five (45) days after his receipt of the record the reviewing officer shall make his decision: Provided, however, That if more than forty-five (45) days are required for a decision after the record is received, the reviewing officer shall notify the parties to the appeal and specify the reason for delay. The decisions of reviewing officers shall include: (1) A statement of facts, (2) conclusions, and (3) reasons upon which the conclusions are based.

(f) A decision of the authorized officer from which an appeal is taken shall not be automatically stayed by the filing of a statement of appeal. A request for a stay may accompany the statement of appeal or may be directed to the reviewing officer. The reviewing officer shall promptly rule on requests for stays. The decision of the Regional Forester on requests for stays shall constitute the final administrative appeal decision.

§ 228.15 Operations within National Forest Wilderness.

(a) The United States mining laws shall extend to each National Forest Wilderness for the period specified in the Wilderness Act and subsequent establishing legislation to the same extent they were applicable prior to the date the Wilderness was designated by Congress as a part of the National Wilderness Preservation System. Subject to valid existing rights, no person shall have any right or interest in or to any mineral deposits which

may be discovered through prospecting or other information-gathering activity after the legal date on which the United States mining laws cease to apply to the specific Wilderness.

(b) Holders of unpatented mining claims validly established on any National Forest Wilderness prior to inclusion of such unit in the National Wilderness Preservation System shall be accorded the rights provided by the United States mining laws as then applicable to the National Forest land involved. Persons locating mining claims in any National Forest Wilderness on or after the date on which said Wilderness was included in the National Wilderness Preservation System shall be accorded the rights provided by the United States mining laws as applicable to the National Forest land involved and subject to provisions specified in the establishing legislation. Persons conducting operations as defined in § 228.3 in National Forest Wilderness shall comply with the regulations in this part. Operations shall be conducted so as to protect National Forest surface resources in accordance with the general purposes of maintaining the National Wilderness Preservation System unimpaired for future use and enjoyment as wilderness and to preserve its wilderness character, consistent with the use of the land for mineral location, exploration, development drilling, and production and for transmission lines, water lines, telephone lines, and processing operations, including, where essential, the use of mechanized transport, aircraft or motorized equipment.

(c) Persons with valid mining claims wholly within National Forest Wilderness shall be permitted access to such surrounded claims by means consistent with the preservation of National Forest Wilderness which have been or are being customarily used with respect to other such claims surrounded by National Forest Wilderness. No operator shall construct roads across National Forest Wilderness unless authorized in writing by the Forest Supervisor in accordance with § 228.12.

(d) On all mining claims validly established on lands within the National Wilderness Preservation System, the operator shall take all reasonable measures to remove any structures, equipment and other facilities no longer needed for mining purposes in

accordance with the provisions in § 228.10 and restore the surface in accordance with the requirements in § 228.8(g).

(e) The title to timber on patented claims validly established after the land was included within the National Wilderness Preservation System remains in the United States, subject to a right to cut and use timber for mining purposes. So much of the mature timber may be cut and used as is needed in the extraction, removal, and beneficiation of the mineral deposits, if needed timber is not otherwise reasonably available. The cutting shall comply with the requirements for sound principles of forest management as defined by the National Forest rules and regulations and set forth in stipulations to be included in the plan of operations, which as a minimum incorporate the following basic principles of forest management:

(1) Harvesting operations shall be so conducted as to minimize soil movement and damage from water runoff; and

(2) Slash shall be disposed of and other precautions shall be taken to minimize damage from forest insects, disease, and fire.

(f) The Chief, Forest Service, shall allow any activity, including prospecting, for the purpose of gathering information about minerals in National Forest Wilderness except that any such activity for gathering information shall be carried on in a manner compatible with the preservation of the wilderness environment as specified in the plan of operations.

APPENDIX G

PROVISIONS OF CALIFORNIA COASTAL ACT, CAL. PUB. RES. CODE SECTIONS 30000 ET SEQ.

Chapter 1
Findings and Declarations and General Provisions

§ 30000. Citation

This division shall be known and may be cited as the California Coastal Act of 1976.

§ 30001. Legislative findings and declarations; ecological balance

The Legislature hereby finds and declares:

(a) That the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem.

(b) That the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation.

(c) That to promote the public safety, health and welfare, and to protect public and private property, wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction.

(d) That existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coastal zone.

§ 30001.2. Legislative findings and declarations; economic development

The Legislature further finds and declares that, notwithstanding the fact electrical generating facilities, refineries, and coastal-dependent developments, including ports and commercial fishing

facilities, offshore petroleum and gas development, and liquefied natural gas facilities, may have significant adverse effects on coastal resources or coastal access, it may be necessary to locate such developments in the coastal zone in order to ensure that inland as well as coastal resources are preserved and that orderly economic development proceeds within the state.

§ 30001.5. Legislative findings and declarations; goals

The Legislature further finds and declares that the basic goals of the state for the coastal zone are to:

(a) Protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.

(b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state.

(c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners.

(d) Assure priority for coastal-dependent and coastal-related development over other development on the coast.

(e) Encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development for mutually beneficial uses, including educational uses, in the coastal zone.

§ 30002. Legislative findings and declarations; implementation of plan

The Legislature further finds and declares that:

(a) The California Coastal Zone Conservation Commission, pursuant to the California Coastal Zone Conservation Act of 1972 (commencing with Section 27000), has made a detailed study of the coastal zone; that there has been extensive participation by other governmental agencies, private interests, and the general public in the study; and that, based on the study, the commission has prepared a plan for the orderly, long-range

conservation, use, and management of the natural, scenic, cultural, recreational, and manmade resources of the coastal zone.

(b) Such plan contains a series of recommendations which require implementation by the Legislature and that some of those recommendations are appropriate for immediate implementation as provided for in this division while others require additional review.

§ 30003. Compliance by public agencies

All public agencies and all federal agencies, to the extent possible under federal law or regulations or the United States Constitution, shall comply with the provisions of this division.

§ 30004. Legislative findings and declarations; necessity of continued planning and management

The Legislature further finds and declares that:

(a) To achieve maximum responsiveness to local conditions, accountability, and public accessibility, it is necessary to rely heavily on local government and local land use planning procedures and enforcement.

(b) To ensure conformity with the provisions of this division, and to provide maximum state involvement in federal activities allowable under federal law or regulations or the United States Constitution which affect California's coastal resources, to protect regional, state, and national interests in assuring the maintenance of the long-term productivity and economic vitality of coastal resources necessary for the well-being of people of the State, and to avoid long-term costs to the public and a diminished quality of life resulting from the misuse of coastal resources, to coordinate and integrate the activities of the many agencies whose activities impact the coastal zone, and to supplement their activities in matters not properly within the jurisdiction of any existing agency, it is necessary to provide for continued state coastal planning and management through a state coastal commission.

§ 30005. Local governmental powers; nuisances; attorney general's powers

No provision of this division is a limitation on any of the following:

(a) Except as otherwise limited by state law, on the power of a city or county or city and county to adopt and enforce additional regulations, not in conflict with this act, imposing further conditions, restrictions, or limitations with respect to any land or water use or other activity which might adversely affect the resources of the coastal zone.

(b) On the power of any city or county or city and county to declare, prohibit, and abate nuisances.

(c) On the power of the Attorney General to bring an action in the name of the people of the state to enjoin any waste or pollution of the resources of the coastal zone or any nuisance.

(d) On the right of any person to maintain an appropriate action for relief against a private nuisance or for any other private relief.

§ 30005.5. Local governmental powers; construction

Nothing in this division shall be construed to authorize any local government, or to authorize the commission to require any local government, to exercise any power it does not already have under the Constitution and laws of this state or that is not specifically delegated pursuant to Section 30519.

§ 30006. Legislative findings and declarations; public participation

The Legislature further finds and declares that the public has a right to fully participate in decisions affecting coastal planning, conservation, and development; that achievement of sound coastal conservation and development is dependent upon public understanding and support; and that the continuing planning and implementation of programs for coastal conservation and development should include the widest opportunity for public participation.

§ 30007. Housing; local governments

Nothing in this division shall exempt local governments from meeting the requirements of state and federal law with respect to

providing low- and moderate-income housing, replacement housing, relocation benefits, or any other obligation related to housing imposed by existing law or any law hereafter enacted.

§ 30007.5. Legislative findings and declarations; resolution of policy conflicts

The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner which on balance is the most protective of significant coastal resources. In this context, the Legislature declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, then specific wildlife habitat and other similar resource policies.

§ 30008. Division as coastal zone management program

This division shall constitute California's coastal zone management program within the coastal zone for purposes of the Federal Coastal Zone Management Act of 1972 (16 U.S.C. 1451, et seq.) and any other federal act heretofore or hereafter enacted or amended that relates to the planning or management of coastal zone resources; provided, however, that within federal lands excluded from the coastal zone pursuant to the Federal Coastal Zone Management Act of 1972, the State of California shall, consistent with applicable federal and state laws, continue to exercise the full range of powers, rights, and privileges it now possesses or which may be granted.

§ 30009. Construction

This division shall be liberally construed to accomplish its purposes and objectives.

§ 30010. Compensation for taking of private property; legislative declaration

The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the regional commission, the commission, port governing body, or local government acting pursuant to this division to exercise their

power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

§ 30011. Requirements of Gov.C. § 65590; review of local government's application, evidence of compliance; information concerning status of action to apply

Nothing in this division shall authorize the commission to review a local government's application of the requirements of Section 65590 of the Government Code to any development. In addition, the commission shall not require any applicant for a coastal development permit or any local government to provide certification or other evidence of compliance with the requirements of Section 65590 of the Government Code. The commission may, however, solely in connection with coastal development permit applications described in subdivision (c) of Section 30600.1, require information about the status of a local government's action to apply the requirements of Section 65590 of the Government Code. This information shall be used for the purpose of determining time limits for commission action on these applications as provided in that subdivision (c).

Chapter 2

Definitions

§ 30103. Coastal zone; map; purpose

(a) "Coastal zone" means that land and water area of the State of California from the Oregon border to the border of the Republic of Mexico, specified on the maps identified and set forth in Section 17 of that chapter of the Statutes of the 1975-76 Regular Session enacting this division, extending seaward to the state's outer limit of jurisdiction, including all offshore islands, and extending inland generally 1,000 yards from the mean high tide line of the sea. In significant coastal estuarine, habitat, and recreational areas it extends inland to the first major ridgeline paralleling the sea or five miles from the mean high tide line of

the sea, whichever is less, and in developed urban areas the zone generally extends inland less than 1,000 yards. The coastal zone does not include the area of jurisdiction of the San Francisco Bay Conservation and Development Commission, established pursuant to Title 7.2 (commencing with Section 66600) of the Government Code, nor any area contiguous thereto, including any river, stream, tributary, creek, or flood control or drainage channel flowing into such area.

(b) The commission shall, within 60 days after its first meeting, prepare and adopt a detailed map, on a scale of one inch equals 24,000 inches for the coastal zone and shall file a copy of such map with the county clerk of each coastal county. The purpose of this provision is to provide greater detail than is provided by the maps identified in Section 17 of that chapter of the Statutes of the 1975-76 Regular Session enacting this division. The commission may adjust the inland boundary of the coastal zone the minimum landward distance necessary, but in no event more than 100 yards, or the minimum distance seaward necessary, but in no event more than 200 yards, to avoid bisecting any single lot or parcel or to conform it to readily identifiable natural or manmade features.

§ 30106. Development

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a

timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.

Chapter 3

Coastal Resources Planning and Management Policies

Article 1
General

§ 30200. Policies as standards; resolution of policy conflicts

(a) Consistent with the coastal zone values cited in Section 30001 and the basic goals set forth in Section 30001.5, and except as may be otherwise specifically provided in this division, the policies of this chapter shall constitute the standards by which the adequacy of local coastal programs, as provided in Chapter 6 (commencing with Section 30500), and the permissibility of proposed developments subject to the provisions of this division are determined. All public agencies carrying out or supporting activities outside the coastal zone that could have a direct impact on resources within the coastal zone shall consider the effect of such actions on coastal zone resources in order to assure that these policies are achieved.

(b) Where the commission or any local government in implementing the provisions of this division identifies a conflict between the policies of this chapter, Section 30007.5 shall be utilized to resolve the conflict and the resolution of such conflicts shall be supported by appropriate findings setting forth the basis for the resolution of identified policy conflicts.

Article 2
Public Access

§ 30210. Access; recreational opportunities; posting

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

§ 30211. Development not to interfere with access

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

§ 30212. New development projects

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

(b) For purposes of this section, "new development" does not include:

(1) Replacement of any structure pursuant to the provisions of subdivision (g) of Section 30610.

(2) The demolition and reconstruction of a single-family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property as the former structure.

(3) Improvements to any structure which do not change the intensity of its use, which do not increase either the floor area, height, or bulk of the structure by more than 10 percent, which do

not block or impede public access, and which do not result in a seaward encroachment by the structure.

(4) The reconstruction or repair of any seawall; provided, however, that the reconstructed or repaired seawall is not seaward of the location of the former structure.

(5) Any repair or maintenance activity for which the commission has determined, pursuant to Section 30610, that a coastal development permit will be required unless the commission determines that the activity will have an adverse impact on lateral public access along the beach.

As used in this subdivision, "bulk" means total interior cubic volume as measured from the exterior surface of the structure.

(c) Nothing in this division shall restrict public access nor shall it excuse the performance of duties and responsibilities of public agencies which are required by Sections 66478.1 to 66478.14, inclusive, of the Government Code and by Section 4 of Article X of the California Constitution.

§ 30212.5. Public facilities; distribution

Wherever appropriate and feasible, public facilities, including parking areas or facilities, shall be distributed throughout an area so as to mitigate against the impacts, social and otherwise, of overcrowding or overuse by the public of any single area.

§ 30213. Lower cost visitor and recreational facilities; encouragement and provision; overnight room rentals

Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.

Neither the commission nor any regional commission shall either: (1) require that overnight room rentals be fixed at an amount certain for any privately owned and operated hotel, motel, or other similar visitor-serving facility located on either public or private lands; or (2) establish or approve any method for the identification of low or moderate income persons for the purpose of determining eligibility for overnight room rentals in any such facilities.

§ 30214. Implementation of public access policies; legislative intent

(a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following.

(1) Topographic and geologic site characteristics.

(2) The capacity of the site to sustain use and at what level of intensity.

(3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.

(4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter.

(b) It is the intent of the Legislature that the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the rights of the individual property owner with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution. Nothing in this section or any amendment thereto shall be construed as a limitation on the rights guaranteed to the public under Section 4 of Article X of the California Constitution.

(c) In carrying out the public access policies of this article, the commission, regional commissions, and any other responsible public agency shall consider and encourage the utilization of innovative access management techniques, including, but not limited to, agreements with private organizations which would minimize management costs and encourage the use of volunteer programs.

Article 3
Recreation

§ 30220. Protection of certain water-oriented activities

Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.

§ 30221. Oceanfront land; protection for recreational use and development

Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

§ 30222. Private lands; priority of development purposes

The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry.

§ 30222.5. Oceanfront lands; aquaculture facilities; priority

Ocean front land that is suitable for coastal dependent aquaculture shall be protected for that use, and proposals for aquaculture facilities located on those sites shall be given priority, except over other coastal dependent developments or uses.

§ 30223. Upland areas

Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.

§ 30224. Recreational boating use; encouragement; facilities

Increased recreational boating use of coastal waters shall be encouraged, in accordance with this division, by developing dry storage areas, increasing public launching facilities, providing additional berthing space in existing harbors, limiting non-water-dependent land uses that congest access corridors and preclude boating support facilities, providing harbors of refuge, and by providing for new boating facilities in natural harbors, new protected water areas, and in areas dredged from dry land.

Article 4
Marine Environment

§ 30230. Marine resources; maintenance

Marine resources shall be maintained, enhanced, and, where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

§ 30321. Biological productivity; waste water

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

§ 30232. Oil and hazardous substance spills

Protection against the spillage of crude oil, gas, petroleum products, or hazardous substances shall be provided in relation to any development or transportation of such materials. Effective containment and cleanup facilities and procedures shall be provided for accidental spills that do occur.

§ 30233. Diking, filling or dredging; continued movement of sediment and nutrients

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environment effects, and shall be limited to the following:

(1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.

(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.

(3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland. The size of the wetland area used for boating facilities, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities shall not exceed 25 percent of the degraded wetland.

(4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

(5) Incidental public service purposes, including, but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.

(6) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.

(7) Restoration purposes.

(8) Nature study, aquaculture, or similar resource-dependent activities.

(b) Dredging and spoils disposal shall be planned and carried out to avoid significant disruption to marine and wildlife habitats and water circulation. Dredge spoils suitable for beach replenishment should be transported for such purposes to appropriate beaches or into suitable longshore current systems.

(c) In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary.

Any alteration of coastal wetlands identified by the Department of Fish and Game, including, but not limited to, the 19 coastal wetlands identified in its report entitled, "Acquisition Priorities for the Coastal Wetlands of California", shall be limited to very minor incidental public facilities, restorative measures, nature study, commercial fishing facilities in Bodega Bay, and development in already developed parts of south San Diego Bay, if otherwise in accordance with this division.

For the purposes of this section, "commercial fishing facilities in Bodega Bay" means that not less than 80 percent of all boating facilities proposed to be developed or improved, where such improvement would create additional berths in Bodega Bay, shall be designed and used for commercial fishing activities.

(d) Erosion control and flood control facilities constructed on watercourses can impede the movement of sediment and nutrients which would otherwise be carried by storm runoff into coastal waters. To facilitate the continued delivery of these sediments to the littoral zone, whenever feasible, the material removed from these facilities may be placed at appropriate points on the shoreline in accordance with other applicable provisions of this division, where feasible mitigation measures have been provided to minimize adverse environmental effects. Aspects that shall be considered before issuing a coastal development permit for such purposes are the method of placement, time of year of placement, and sensitivity of the placement area.

§ 30234. Commercial fishing and recreational boating facilities

Facilities serving the commercial fishing and recreational boating industries shall be protected and, where feasible, upgraded. Existing commercial fishing and recreational boating harbor space shall not be reduced unless the demand for those facilities no longer exists or adequate substitute space has been provided. Proposed recreational boating facilities shall, where feasible, be designed and located in such a fashion as not to interfere with the needs of the commercial fishing industry.

§ 30235. Revetments, breakwaters, etc.

Revetments, breakwaters, groins, harbor channels, seawalls, cliff -retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fish-kills should be phased out or upgraded where feasible.

§ 30236. Water supply and flood control

Channelizations, dams, or other substantial alterations of rivers and streams shall incorporate the best mitigation measures feasible, and be limited to (1) necessary water supply projects, (2) flood control projects where no other method for protecting existing structures in the flood plain is feasible and where such protection is necessary for public safety or to protect existing development, or (3) developments where the primary function is the improvement of fish and wildlife habitat.

§ 30237. Bolsa Chica wetlands in County of Orange; habitat conservation plan

(a) This section shall apply only to the Bolsa Chica wetlands or a portion thereof in the County of Orange.

The County of Orange or any landowner may petition the Department of Fish and Game, on or before October 1, 1983, to prepare a habitat conservation plan. Upon receipt of the petition, the Department of Fish and Game and the State of Coastal Conservancy, in cooperation with the county and any landowner, shall jointly prepare a habitat conservation plan in order to carry out the following objectives:

(1) To provide for the conservation of the habitat of fish and wildlife resources.

(2) To anticipate and resolve potential conflicts between the conservation of fish and wildlife resources or their habitat and actions by local, state, or federal agencies and private persons.

(3) To provide for greater certainty and predictability regarding the conservation of fish and wildlife resources and their

habitat and regarding private and public activities potentially affecting those resources.

(b) With respect to the preparation of the habitat conservation plan, the Department of Fish and Game shall be the lead agency for wetland identification purposes and the State Coastal Conservancy shall be the lead agency for the purposes of identifying land use alternatives. Upon completion of the habitat conservation plan and on or before July 20, 1984, the Department of Fish and Game and the State Coastal Conservancy shall jointly forward it to the commission for approval. The commission shall approve the plan if it finds it raises no substantial issue as to conformity with the planning and management policies of this chapter. If the plan is approved by the commission, it may be incorporated into the county's local coastal program.

(c) All costs of preparation of the habitat conservation plan, including, but not limited to, additional necessary personnel temporarily appointed by the Department of Fish and Game and the State Coastal Conservancy, shall be paid by the petitioner or petitioners. If additional personnel are necessary, the Department of Finance shall review the requests to ensure that the personnel required will be utilized to carry out only the purposes of this section. If the Department of Finance finds the additional personnel required will be utilized only to carry out the purposes of this section, the temporary appointment requests shall be processed and approved by the Department of Finance in an expedited fashion, in no event longer than 10 working days after the requests are made. Furthermore, these requests for temporary appointments shall be exempt from all state personnel hiring requirements and procedures, except for affirmative action requirements, for the review provided in this subdivision by the Department of Finance, and from any personnel hiring limitations during the time period set forth in this section for the preparation of the habitat conservation plan.

Article 5
Land Resources

§ 30240. Environmentally sensitive habitat areas; adjacent developments

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

§ 30241. Prime agriculture land; maintenance in agriculture production

The maximum amount of prime agricultural land shall be maintained in agricultural production to assure the protection of the area's agricultural economy, and conflicts shall be minimized between agricultural and urban land uses through all of the following:

(a) By establishing stable boundaries separating urban and rural areas, including, where necessary, clearly defined buffer areas to minimize conflicts between agricultural and urban land uses.

(b) By limiting conversions of agricultural lands around the periphery of urban areas to the lands where the viability of existing agricultural use is already severely limited by conflicts with urban uses or where the conversion of the lands would complete a logical and viable neighborhood and contribute to the establishment of a stable limit to urban development.

(c) By permitting the conversion of agricultural land surrounded by urban uses where the conversion of the land would be consistent with Section 30250.

(d) By developing available lands not suited for agriculture prior to the conversion of agricultural lands.

(e) By assuring that public service and facility expansions and nonagricultural development do not impair agricultural viability, either through increased assessment costs or degraded air and water quality.

(f) By assuring that all divisions of prime agricultural lands, except those conversions approved pursuant to subdivision (b), and all development adjacent to prime agricultural lands shall not diminish the productivity of prime agricultural lands.

§ 30241.5. Agricultural land; determination of viability of uses; economic feasibility evaluation

(a) If the viability of existing agricultural uses is an issue pursuant to subdivision (b) of Section 30241 as to any local coastal program or amendment to any certified local coastal program submitted for review and approval under this division, the determination of "viability" shall include, but not be limited to, consideration of an economic feasibility evaluation containing at least both of the following elements:

(1) An analysis of the gross revenue from the agricultural products grown in the area for the five years immediately preceding the date of the filing of a proposed local coastal program or an amendment to any local coastal program.

(2) An analysis of the operational expenses, excluding the cost of land, associated with the production of the agricultural products grown in the area for the five years immediately preceding the date of the filing of a proposed local coastal program or an amendment to any local coastal program.

For purposes of this subdivision, "area" means a geographic area of sufficient size to provide an accurate evaluation of the economic feasibility of agricultural uses for those lands included in the local coastal program or in the proposed amendment of a certified local coastal program.

(b) The economic feasibility evaluation required by subdivision (a) shall be submitted to the commission, by the local government, as part of its submittal of a local coastal program or an amendment to any local coastal program. If the local government determines that it does not have the staff with the necessary expertise to conduct the economic feasibility evaluation, the evaluation may be conducted under agreement with the local government by a consultant selected jointly by local government and the executive director of the commission.

§ 30242. Lands suitable for agricultural use; conversion

All other lands suitable for agricultural use shall not be converted to nonagricultural uses unless (1) continued or renewed agricultural use is not feasible, or (2) such conversion would preserve prime agricultural land or concentrate development consistent with Section 30250. Any such permitted conversion shall be compatible with continued agricultural use on surrounding lands.

§ 30243. Productivity of soils and timberlands; conversions

The long-term productivity of soils and timberlands shall be protected, and conversions of coastal commercial timberlands in units of commercial size to other uses or their division into units of noncommercial size shall be limited to providing for necessary timber processing and related facilities.

§ 30244. Archaeological or paleontological resources

Where development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.

Article 6
Development

§ 30250. Location, generally

(a) New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. In addition, land divisions, other than leases for agricultural uses, outside

existing developed areas shall be permitted only where 50 percent of the usable parcels in the area have been developed and the created parcels would be no smaller than the average size of surrounding parcels.

(b) Where feasible, new hazardous industrial development shall be located away from existing developed areas.

(c) Visitor-serving facilities that cannot feasibly be located in existing developed areas shall be located in existing isolated developments or at selected points of attraction for visitors.

§ 30251. Scenic and visual qualities

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

§ 30252. Maintenance and enhancement of public access

The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing nonautomobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation, (5) assuring the potential for public transit for high intensity uses such as high-rise office buildings, and by (6) assuring that the recreational needs of new residents will not overload nearby coastal recreation areas by correlating the amount of development with local park acquisition and development plans with the

provision of onsite recreational facilities to serve the new development.

§ 30253. Safety, stability, pollution, energy conservation visitors

New development shall:

(1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.

(2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

(3) Be consistent with requirements imposed by an air pollution control district or the State Air Resources Control Board as to each particular development.

(4) Minimize energy consumption and vehicle miles traveled.

(5) Where appropriate, protect special communities and neighborhoods which because of their unique characteristics, are popular visitor destination points for recreational uses.

§ 30254. Public works facilities

New or expanded public works facilities shall be designed and limited to accommodate needs generated by development or uses permitted consistent with the provisions of this division; provided, however, that it is the intent of the Legislature that State Highway Route 1 in rural areas of the coastal zone remain a scenic two-lane road. Special districts shall not be formed or expanded except where assessment for, and provision of, the service would not induce new development inconsistent with this division. Where existing or planned public works facilities can accommodate only a limited amount of new development, services to coastal dependent land use, essential public services and basic industries vital to the economic health of the region, state, or nation, public recreation, commercial recreation, and visitor-serving land uses shall not be precluded by other development.

§ 30254.5. Terms or conditions on sewage treatment plant development; prohibition

Notwithstanding any other provision of law, the commission may not impose any term or condition on the development of any sewage treatment plant which is applicable to any future development that the commission finds can be accommodated by that plant consistent with this division. Nothing in this section modifies the provisions and requirements of Sections 30254 and 30412.

§ 30255. Priority of coastal-dependent developments

Coastal-dependent developments shall have priority over other developments on or near the shoreline. Except as provided elsewhere in this division, coastal-dependent developments shall not be sited in a wetland. When appropriate, coastal-related developments should be accommodated within reasonable proximity to the coastal-dependent uses they support.

Article 7
Industrial Development

§ 30260. Location or expansion

Coastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division. However, where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted in accordance with this section and Sections 30261 and 30262 if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible.

§ 30261. Use of tanker facilities; liquefied natural gas terminals

(a) Multicompany use of existing and new tanker facilities shall be encouraged to the maximum extent feasible and legally permissible, except where to do so would result in increased tanker operations and associated onshore development incompatible with the land use and environmental goals for the area. New tanker terminals outside of existing terminal areas shall be situated as to avoid risk to environmentally sensitive areas and shall use a monobuoy system, unless an alternative type of system can be shown to be environmentally preferable for a specific site. Tanker facilities shall be designed to (1) minimize the total volume of oil spilled, (2) minimize the risk of collision from movement of other vessels, (3) have ready access to the most effective feasible containment and recovery equipment for oilspills, and (4) have onshore deballasting facilities to receive any fouled ballast water from tankers where operationally or legally required.

(b) Because of the unique problems involved in the importation, transportation, and handling of liquefied natural gas, the location of terminal facilities therefor shall be determined solely and exclusively as provided in Chapter 10 (commencing with Section 5550) of Division 2 of the Public Utilities Code and the provisions of this division shall not apply unless expressly provided in such Chapter 10.

§ 30262. Oil and gas development

Oil and gas development shall be permitted in accordance with Section 30260, if the following conditions are met:

(a) The development is performed safely and consistent with the geologic conditions of the well site.

(b) New or expanded facilities related to such development are consolidated, to the maximum extent feasible and legally permissible, unless consolidation will have adverse environmental consequences and will not significantly reduce the number of producing wells, support facilities, or sites required to produce the reservoir economically and with minimal environmental impacts.

(c) Environmentally safe and feasible subsea completions are used when drilling platforms or islands would substantially degrade coastal visual qualities unless use of such structures will result in substantially less environmental risks.

(d) Platforms or islands will not be sited where a substantial hazard to vessel traffic might result from the facility or related

operations, determined in consultation with the United States Coast Guard and the Army Corps of Engineers.

(e) Such development will not cause or contribute to subsidence hazards unless it is determined that adequate measures will be undertaken to prevent damage from such subsidence.

(f) With respect to new facilities, all oilfield brines are reinjected into oil-producing zones unless the Division of Oil and Gas of the Department of Conservation determines to do so would adversely affect production of the reservoirs and unless injection into other subsurface zones will reduce environmental risks. Exceptions to reinjections will be granted consistent with the Ocean Waters Discharge Plan of the State Water Resources Control Board and where adequate provision is made for the elimination of petroleum odors and water quality problems.

Where appropriate, monitoring programs to record land surface and near-shore ocean floor movements shall be initiated in locations of new large-scale fluid extraction on land or near shore before operations begin and shall continue until surface conditions have stabilized. Costs of monitoring and mitigation programs shall be borne by liquid and gas extraction operators.

§ 30263. Refineries or petrochemical facilities

(a) New or expanded refineries or petrochemical facilities not otherwise consistent with the provisions of this division shall be permitted if (1) alternative locations are not feasible or are more environmentally damaging; (2) adverse environmental effects are mitigated to the maximum extent feasible; (3) it is found that not permitting such development would adversely affect the public welfare; (4) the facility is not located in a highly scenic or seismically hazardous area, on any of the Channel Islands, or within or contiguous to environmentally sensitive areas; and (5) the facility is sited so as to provide a sufficient buffer area to minimize adverse impacts on surrounding property.

(b) In addition to meeting all applicable air quality standards, new or expanded refineries or petrochemical facilities shall be permitted in areas designated as air quality maintenance areas by the State Air Resources Board and in areas where coastal re-

sources would be adversely affected only if the negative impacts of the project upon air quality are offset by reductions in gaseous emissions in the area by the users of the fuels, or, in the case of an expansion of an existing site, total site emission levels, and site levels for each emission type for which national or state ambient air quality standards have been established do not increase.

(c) New or expanded refineries or petrochemical facilities shall minimize the need for once-through cooling by using air cooling to the maximum extent feasible and by using treated waste waters from inplant processes where feasible.

§ 30264 Thermal electric generating plants

Notwithstanding any other provision of this division, except subdivisions (b) and (c) of Section 30413, new or expanded thermal electric generating plants may be constructed in the coastal zone if the proposed coastal site has been determined by the State Energy Resources Conservation and Development Commission to have greater relative merit pursuant to the provisions of Section 25516.1 than available alternative sites and related facilities for an applicant's service area which have been determined to be acceptable pursuant to the provisions of Section 25516.

§ 30265. Legislative findings and declarations; offshore oil transportation

The Legislature finds and declares all of the following:

(a) Offshore oil production will increase dramatically in the next 10 years from the current 80,000 barrels per day to over 400,000 barrels per day.

(b) Transportation studies have concluded that pipeline transport of oil is generally both economically feasible and environmentally preferable to other forms of crude oil transport.

(c) Oil companies have proposed to build a pipeline to transport offshore crude oil from central California to southern California refineries, and to transport offshore oil to out-of-state refiners.

(d) California refineries would need to be retrofitted if California offshore crude oil were to be used directly as a major

feedstock. Refinery modifications may delay achievement of air quality goals in the southern California air basin and other regions of the state.

(e) The County of Santa Barbara has issued an Oil Transportation Plan which assesses the environmental and economic differences among various methods for transporting crude oil from offshore California to refineries.

(f) The Governor should help coordinate decisions concerning the transport and refining of offshore oil in a manner which considers state and local studies undertaken to date, which fully addresses the concerns of all affected regions, and which promotes the greatest benefits to the people of the state.

§ 30265.5. Governor or designee; coordination of activities concerning offshore oil transport and refining; duties

(a) The Governor, or the Governor's designee, shall coordinate activities concerning the transport and refining of offshore oil. Coordination efforts shall consider public health risks, the ability to achieve short-and long-term air emission reduction goals, the potential for reducing California's vulnerability and dependence on oil imports, economic development and jobs, and other factors deemed important by the Governor, or the Governor's designee.

(b) The Governor, or the Governor's designee, shall work with state and local agencies, and the public, to facilitate the transport and refining of offshore oil in a manner which will promote the greatest public health and environmental and economic benefits to the people of the state.

(c) The Governor, or the Governor's designee, shall consult with any individual or organization having knowledge in this area, including, but not limited to, representatives from the following:

(1) State Energy Resources Conservation and Development Commission.

(2) State Air Resources Board.

(3) California Coastal Commission.

(4) Department of Fish and Game.

(5) State Lands Commission.

(6) Public Utilities Commission.

(7) Santa Barbara County

(8) Santa Barbara County Air Pollution Control District.

(9) Southern California Association of Governments.

(10) South Coast Air Quality Management District.

(11) Oil industry.

(12) Public interest groups.

(13) United States Department of the Interior

(14) United States Department of Energy

(15) United States Environmental Protection Agency.

(16) National Oceanic and Atmospheric Administration.

(17) United States Coast Guard.

(d) This act is not intended, and shall not be construed, to decrease, duplicate, or supersede the jurisdiction, authority, or responsibilities of any local government, or any state agency or commission, to discharge its responsibilities concerning the transportation and refining of oil.

Chapter 7
Development Controls

§ 30600. Coastal development permit; local government

(a) In addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, on or after January 1, 1977, any person wishing to perform or undertake any development in the coastal zone, other than a facility subject to the provisions of Section 25500, shall obtain a coastal development permit.

(b) Prior to certification of its local coastal program, a local government may, with respect to any development within its area of jurisdiction in the coastal zone and consistent with the provi-

sion of Sections 30604, 30620, and 30620.5, establish procedures for the filing, processing, review, modification, approval, or denial of a coastal development permit. Such procedures may be incorporated and made a part of the procedures relating to any other appropriate land use development permit issued by the local government. A coastal government permit from a local government shall not be required by this subdivision for any development on tidelands, submerged lands, or on public trust lands, whether filled or unfilled, or for any development by a public agency for which a local government permit is not otherwise required.

(c) If prior to certification of its local coastal program, a local government does not exercise the option provided in subdivision (b), or a development is not subject to the requirements of subdivision (b), a coastal development permit shall be obtained from the commission or from a local government as provided in subdivision (d).

(d) After certification of its local coastal program or pursuant to the provisions of Section 30600.5, a coastal development permit shall be obtained from the local government as provided for in Section 30519 or Section 30600.5.

§ 30604. Coastal development permit; issuance; finding

(a) Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200). A denial of coastal development permit on grounds it would prejudice the ability of the local government to prepare a local coastal program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200) shall be accompanied by a specific finding which sets forth the basis for such conclusion.

(b) After certification of the local coastal program a coastal development permit shall be issued if the issuing agency or the commission on appeal finds that the proposed development is in conformity with the certified local coastal program.

(c) Every coastal development permit issued for any development between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone shall include a specific finding that such development is in conformity with the public access and public recreation policies of Chapter 3 (commencing with Section 30200).

(d) No development or any portion thereof which is outside the coastal zone shall be subject to the coastal development permit requirements of this division, nor shall anything in this division authorize the denial of a coastal development permit by the commission or any regional commission on the grounds the proposed development within the coastal zone will have an adverse environmental effect outside the coastal zone.

(e) No coastal development permit may be denied under this division on the grounds that a public agency is planning or contemplating to acquire the property on, or property adjacent to the property on, which the proposed development is to be located, unless the public agency has been specifically authorized to acquire such property and there are funds available, or funds which could reasonably be expected to be made available within one year, for such acquisition. If a permit has been denied for such reason and the property has not been acquired by a public agency within a reasonable period of time, a permit may not be denied for such development on grounds that such property, or adjacent property, is to be acquired by a public agency when the application for such a development is resubmitted.

APPENDIX H

United States District Court
Northern District of California

No. C-83-5137 WWS

[Filed Mar. 30, 1984]
Granite Rock Company,
Plaintiff,
vs.
California Coastal Commission, et al.,
Defendants.

DECLARATION OF ANSEL ADAMS

I, Ansel Adams, declare and state as follows:

1. I am a photographer and have resided in Carmel, California since 1962.

2. I am familiar with the Big Sur Coast and Pico Blanco, from having visited the area on numerous occasions since at least 1927.

3. Exhibit A attached to this declaration is a photograph of Pico Blanco, which I took on or about 1968. Pico Blanco is visible from Highway One, which runs along the Big Sur Coast. The Exhibit A photograph was taken near the mouth of the Little Sur River where Highway One crosses the River.

4. The exhibit A print was made by my assistant, Chris Rainier, from a Polaroid Land 4 x 5 inch negative (Type 55 P/N) which I had previously developed.

5. Exhibit A accurately depicts the physical configuration and geography of Pico Blanco and the surrounding landscape, as viewed from the Little Sur River by Highway One at the time the photograph was taken. The present configuration and geography of Pico Blanco is substantially similar to that depicted in Exhibit A.

6. I am 82 years old, and I have had the privilege, in my life, of viewing and photographing some of the scenic natural areas in the United States. The Big Sur Coast, including Pico Blanco Mountain, is an area of unparalleled natural beauty. In my opinion, the scarring and damage to Pico Blanco from limestone mining and quarrying, and the development of facilities for transporting ore from Pico Blanco to Highway One through the Little Sur watershed, would cause irreparable harm to the scenic beauty and ambiance of the Big Sur Coast, and would work a loss that could never be replaced.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Carmel, California on March 24, 1984.

/s/ ANSEL ADAMS
Declarant

APPENDIX I

MEMORANDUM OF UNDERSTANDING

Surface Mining and Reclamation Coordination in the State of California

Between

THE STATE OF CALIFORNIA, RESOURCES AGENCY;

U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE,
PACIFIC SOUTHWEST REGION;

and

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF LAND MANAGEMENT, CALIFORNIA

THIS AGREEMENT, made and entered into by and between the State of California, Resources Agency, through its Secretary, hereinafter called the State, The Pacific Southwest Region of the United States Forest Service, through its Regional Forester, hereinafter called the Forest Service, and the Bureau of Land Management, through its State Director, California, hereinafter called BLM.

WITNESSETH:

WHEREAS, local, state and federal agencies have certain interests in regulating surface effects of mining on federal public lands or on combinations of public and private lands, it is deemed advisable to develop a policy between federal land managing agencies and the State to serve as guidance for local agencies (counties and cities) in fulfilling their lead agency regulatory responsibilities in such situations.

WHEREAS, several major and numerous minor acts of Congress permit the extraction of minerals on lands under the jurisdiction of the Forest Service and the BLM.

WHEREAS, the Forest Service has basic responsibility for management of the surface resources of National Forest lands on which operations take place under the authority of the 1872

Mining Law (16 USC 478, 551). BLM has similar responsibilities on public lands under its jurisdiction.

WHEREAS, there is a statutory right for persons to prospect and mine on National Forest System land and BLM administered public land open to operation of the 1872 Mining Law, providing they comply with the rules and regulations covering federal public lands involved.

WHEREAS, the surface effects of mining minerals on federal lands which are subject to lease by the federal government are of concern to other federal agencies than those signatory to this agreement, it is not the intent of this agreement to apply to those minerals.

WHEREAS, the Forest Service will require that operations, conducted under the authority of the 1872 Mining Law, which might cause significant surface resource disturbance, shall be conducted under procedures identified in 36 CFR 252; and will attempt to minimize or prevent, mitigate and repair adverse environmental impacts on National Forest System resources by imposing reasonable conditions which do not materially interfere with such operations.

WHEREAS, BLM will require operations under the authority of the 1872 Mining Law, which might cause significant surface resource disturbance, shall be conducted under authority established by the Federal Land Policy and Management Act of 1976.

WHEREAS, lead agencies have the responsibility under the Surface Mining and Reclamation Act of 1975 (SMARA) and State policy for Surface Mining and Reclamation Practice to regulate surface mining and reclamation within their jurisdictions so as to assure that:

(1) Adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses,

(2) The production and conservation of minerals are encouraged, while giving consideration to values relating to recreation, watershed, wildlife, range and forage, and aesthetic enjoyment, and

(3) Residual hazards to the public health and safety are eliminated.

NOW, THEREFORE, the parties to this memorandum hereby understand and agree that the following will satisfy the aforesaid concerns and the requirements of the aforesaid laws and are acceptable to both Federal agencies and the State. It is agreed that in regulation of surface mining of the subject minerals on public or on combination of public and private lands:

(1) Lead agencies and federal agencies shall work cooperatively to insure, as practicable, that conditions required of operators in minimizing adverse environmental impacts conform to applicable local, state and federal laws and regulations, and

(2) Lead agencies may accept as functional equivalents to their requirements under SMARA, operating plans, reclamation plans and environmental studies submitted pursuant to federal laws and regulation when such plans and studies meet or exceed minimum statewide standards set by the Mining and Geology Board in its state policy for Surface Mining and Reclamation Practice, and alternatively,

(3) BLM and Forest Service may accept as functional equivalents to their requirements documents relating to operating plans, reclamation plans and environmental studies submitted to lead agencies when such plans and studies meet or exceed minimum standards set by USDA regulations and the Forest Service Manual and/or USDI/BLM regulations when promulgated.

The Forest Service and BLM Will:

(1) Direct each Forest Supervisor and District Manager to cooperate with the pertinent Counties in developing a Memorandum of Understanding that includes the procedures identified in the sample attached hereto as Exhibit A.

The State Will:

1. Recommend to each County within which is located National Forest land or public land administered by BLM that it cooperate with the National Forest Supervisor and/or District

Manager in developing a Memorandum of Understanding that includes the procedures identified in the sample attached hereto as Exhibit A.

This agreement shall continue in force until terminated by any party upon thirty (30) days notice, in writing to the others of their intention to terminate the agreement upon a date specified.

STATE OF CALIFORNIA

DATED: 2/22/79 /s/ Secretary, Resources Agency

FOREST SERVICE

DATED: 2/1/79 /s/ Regional Forester,
Pacific Southwest Region

BUREAU OF LAND
MANAGMENT

DATED: 2/26/79 /s/ State Director

APPENDIX J

MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING is entered into among the Forest Service, United States Department of Agriculture, acting by and through the Regional Foresters, Intermountain and Rocky Mountain Regions (the "Forest Service"), and the State of Colorado, acting by and through the Department of Natural Resources (the "Department") for the use and benefit of the Colorado Board of Land Commissioners (the "Land Board") and the Colorado Mined Land Reclamation Division (the "Division").

I. PURPOSE

The purpose of this memorandum is to eliminate duplication of reclamation bonding requirements for the use and reclamation of National Forest System lands incident to land-disturbing mineral exploration and mining operations. This memorandum applies to operations on National Forest System lands under the General Mining Law, 30 USC § 22, et seq., to which 36 CFR 228 Forest Service Procedures for use of the surface in connection with the General Mining Law, apply. The Forest Service 36 CFR 228 regulations include a reclamation bonding provision. The Division, pursuant to the Colorado Mined Land Reclamation Act, C.R.S. 1973, 34-32-101, et seq., and the Colorado Surface Coal Mining and Reclamation Act, C.R.S. 1973, 34-33-101, et seq., also requires surety for reclamation. In addition, the Land Board, pursuant to constitutional and statutory authority, requires the posting of surety bond in connection with operations for the exploration for or mining of state owned minerals underlying the National Forest System land. Such bonding provisions raise the possibility of duplication of reclamation bonding.

II. AUTHORITY

This memorandum is based on the following authorities:

A. Forest Service
1. 16 USC 478
2. 16 USC 551

3. 36 CFR 228, 228.8(g) and 228.13
4. Forest Service Manual (FSM) 2817.24
5. FSM 6506, 6506.82

B. Colorado
1. Colo Const. Art IX Sec 9
2. C.R.S. 1973, 34-32-101 et seq.
3. C.R.S. 1973, 34-33-101 et seq.
4. C.R.S. 1973, 36-1-101 et seq.
5. Colorado Mined Land Reclamation Board Regulations 2C.C.R. 407-1; 2C.C.R. 407-2

III. UNDERSTANDING

The parties mutually understand that when a reclamation bond is required by the Forest Service under 36 CFR 228.13 and also by the State of Colorado under any of the aforesaid authorities, and when the operator so requests in writing, the following procedures will be utilized:

A. The reclamation bond will be issued in the name of the State of Colorado and will be held and administered by the Division.

B. The bond so issued must meet the Forest Service bonding requirements FSM 6506. It is agreed that the form of bond attached hereto as Schedule A meets such requirements.

C. The Division will be primarily responsible for the administration of the reclamation work, with the Forest Service reserving the right to notify the Division of a failure by the operator to meet Forest Service requirements and to take such action as the Forest Service deems appropriate.

D. The bond will not be released, in whole or in part, until the Forest Service has advised the Division that the reclamation work has been completed in a manner satisfactory to the Forest Service. A provision to that effect will be included in the bond and appears as paragraph 11(a) in the attached Schedule A.

E. Upon default, the State, to the extent practicable with the proceeds received under the bond, will cause the reclamation work to be performed in accordance with the reclamation stan-

dards of applicable state law, § 34-33-101 et seq., if coal or § 34-32-101 et seq., if minerals other than coal.

F. Nothing in this memorandum shall prevent the Forest Service or the Land Board from requiring an operator to post an independent reclamation bond with the Forest Service or the Land Board if at any time the Forest Service or the Land Board determines that the bond posted with the Division is inadequate for the protection of National Forest System lands or lands where the mineral estate is under Land Board jurisdiction.

G. The termination of this understanding will not affect outstanding bonds posted in accord with this memorandum.

IV. TERMINATION

This memorandum may be terminated by any party, for any reason, upon sixty (60) days notice to the other parties.

The parties agree to implement the terms and conditions of this agreement as of the date of the final signature below.

DATE: 10/21/81 /s/ Executive Director
Department of Natural Resources
State of Colorado

DATE: 10/23/81 /s/ Chairman
Board of Land Commissioners

DATE: 9/8/81 /s/ Regional Forester
Rocky Mountain Region
USDA Forest Service

DATE: 2/5/82 /s/ Regional Forester
Intermountain Region
USDA, Forest Service

APPENDIX K

MEMORANDUM OF UNDERSTANDING BETWEEN THE IDAHO DEPARTMENT OF LANDS AND THE FOREST SERVICE, REGIONS 1 AND 4 CONCERNING MINE RECLAMATION LAWS AND REGULATIONS

THIS MEMORANDUM OF UNDERSTANDING is entered into between the Idaho Department of Lands, hereinafter called the State, and the Forest Service, Regions 1 and 4, hereinafter called the Forest Service.

A. PURPOSE

This Memorandum of Understanding is entered into pursuant to Idaho Code Sec. 67-2348 and 16 U.S.C. 551a. It is mutually recognized that the State is charged with administration of the Idaho Dredge and Placer Mining Protection Act and the Idaho Surface Mining Act (Idaho Code, Title 47, Chapters 13 and 15, respectively, and Dredge and Placer Mining Regulations); the Forest Service is charged with administration of congressional enactments and regulations thereunder (36 CFR 228 and General Mining Law of 1872) applicable to Federal lands within National Forests and other lands under contract or agreement. This Memorandum of Understanding is intended to coordinate the administration between the State and Forest Service of their respective laws and regulations pertaining to mining operations on Federal lands and under Federal jurisdiction. This agreement is further intended to achieve more efficient use of personnel and appropriations by reducing unnecessary, duplicative, and overlapping applications, notices, etc., overlapping inspections by State and Federal personnel, and double bonding, insofar as is lawful and practicable.

B. DEFINITIONS

1. Cooperating Agency—That agency which cooperates with the lead agency.

2. Lead agency—That agency which accepts lead responsibility for management of plan of operation.

3. Exploration and Mining Operations—Operations defined under Idaho Code, 47-1503.5 and .6; 47-1313 and Forest Service 36 CFR 228.

4. Notice—A formal notification of intent to conduct operations, including reclamation, on Federal lands as defined under Forest Service 36 CFR 228 and Idaho Code 47-1506(2)(c).

5. Off-site Activities—All means of access developed, improved or constructed outside the boundaries of unpatented mining claims or specified areas of operation.

6. On-site Activities—All means of access developed, improved or constructed within the boundaries of unpatented mining claims or specified areas of operation.

7. Plan—Formal notification that requires approval to conduct operations; including reclamation, on Federal and State lands in accordance with Forest Service 36 CFR 228 and Idaho Code, Title 47, Chapters 13 and 15.

8. Reclamation—Procedures that will be conducted, where applicable, in accordance with Idaho Code, Title 47, Chapters 13 and 15, and 36 CFR 228.

9. Compliance Enforcement—Administration and inspection of sites and legal action, including bond forfeiture, and pursuing available administrative and legal remedies for reclamation of affected lands, in accordance with an agency's applicable laws and regulations.

10. Federal Lands—Land areas administered by the Forest Service.

C. PERMITS, LICENSES, OPERATING PLANS, RECLAMATION PLANS AND NOTICES OF INTENT

1. For operations on Federal lands, the Forest Service will be the lead agency and the District Ranger will act as the lead agent; however, upon review of an operation where the agencies agree

that it is in the best interest of the agencies, the State may act as lead agent.

The lead agency will:

a. Submit copies of the proposed plan or notice to the cooperating agency, and allow thirty (30) days for comments from the cooperating agency.

b. Prior to approval of the plan, give due consideration to timely comments from the cooperating agency. Upon written request by the cooperating agency, an additional twenty (20) days will be allowed for comment if the delay is necessary to meet specific requirements of Federal or State law, excluding delays caused by inclement weather. The lead agency will proceed independently in processing the plan if the cooperating agency cannot meet the schedule within fifty (50) days.

c. Inspect for compliance with State laws and Forest Service regulations.

d. Promptly notify the cooperating agency of noncompliance with applicable laws and regulations.

e. Inform the cooperating agency at reasonable intervals of general progress of the operation.

2. When there is disagreement between the agencies, the operator shall proceed to obtain approval and/or permit independently from each agency.

3. When both agencies require a mining and reclamation plan, an operator shall submit one plan using the State's format with copies for review and approval by both agencies.

4. The Forest Service will have sole authority over off-sites activities on Federal lands.

5. Upon receipt from the State of a dredge and/or placer mining application, the Forest Service officer will within thirty (30) days after receiving such application either, (a) endorse by affixing his signature thereto or (b) give the State specific written objections thereto.

6. Information received by the State or the Forest Service specifically marked "confidential" shall remain confidential in accordance with applicable laws and regulations, unless released in writing by the applicant. In the event confidential information is necessary for approval of a plan by either agency, the applicant shall comply independently with the requesting agency's laws and regulations.

7. The lead agency, after consulting with the cooperating agency, shall have the responsibility to set the amount of the bond required for reclamation work. If Federal land is involved and the bond amount exceeds that allowed by State law, the operator shall post an additional bond with the Forest Service covering the excess amount.

D. COMPLIANCE ENFORCEMENT

The lead agency shall have the primary responsibility for compliance review of applicable State and Federal laws and/or regulations. Each agency shall have the responsibility for enforcement of its applicable regulations, rules, and laws. The lead agency shall be the principal contact when working with the operator. Neither party is obligated to the other party for personnel or expediture of funds that are not within its appropriation or allotments.

E. BONDING

For operations on Federal lands or under Federal jurisdiction, an operator shall submit one bond in compliance with State laws and regulations. In the event the Forest Service determines that this bond is inadequate, it may require additional bonding in compliance with Federal laws and regulations.

In the event the Forest Service finds it necessary to make a claim against a bond being held by the State, the State agrees to take collection action, in accordance with state mine reclamation laws and regulations, against the bonding company using the State's name, in the same manner as if the claim were being made by the State. Upon recovery, the State will coordinate reclamation with the Forest Service. It is further agreed that when the State holds a bond the State will act in behalf of the

Forest Service on any and all dealings with the bonding companies.

In the event that reclamation costs for any given acre will exceed the $750.00 an acre limit under the Surface Mining Act, the State will pursue recovery of the additional amount from the permittee unless such is covered by an additional Forest Service bond, whereupon the Forest Service will first pursue recovery of the excess amount from the bonding company.

The State agrees not to release the bond until the reclamation work has been completed in a manner satisfactory to the Forest Service, not in excess of reclamation requirements agreed to in the approved reclamation plan in accordance with applicable laws and regulations.

F. LIMITATIONS

This agreement is not intended to waive or otherwise negate any Federal or State laws and regulations or any specific requirements of or nondelegable duties under such laws, and all operators shall fully comply with all applicable Federal and State laws and regulations pertaining to mining and mine reclamation. In instances where the agencies cannot agree, an operator shall comply independently with each agency's laws and regulations.

G. COORDINATION

1. In addition to the aforementioned provisions, the Forest Service as lead agency will:

a. Coordinate with the State on standards of reclamation in compliance with both State and Federal laws and regulations for mining or prospecting activity.

b. Notify the State of any mining operation on private or State lands within or adjacent to the National Forests.

c. Notify the State of any mining activity on private or Federal lands which involves hauling ore over State development roads or proposed road construction over State lands.

d. Promptly report violations of State law and regulations.

2. In addition to the aforementioned provisions, the State as lead agency will:

a. Accept Forest Service notices of certification or approval as verification that mining operations under Forest Service jurisdiction are in compliance with Federal mining laws and regulations and similar or parallel state requirements.

b. Notify the District Ranger of any mining operation on private or State lands which involves hauling ore over Forest development roads or proposed road construction on Federal lands.

c. Notify the District Ranger of any mining operations on Federal lands.

d. Promptly report to the District Ranger violations of Federal laws and regulations.

H. EFFECTIVE DATE

Memorandum of Understanding shall become effective upon signature by the Director, Department of Lands, and Regional Foresters for Regions 1 and 4, and will remain in force unless formally terminated by either party after sixty (60) days written notice to the other of its intention to do so.

In the event either party terminates this agreement, the State agrees to maintain the bonds on any mining operation under bond on the date of termination; any such bonds will be maintained by the State until such time as an agreement can be reached between the operator, the State, and the Forest Service to replace or release the bond, thereby relieving the State of the responsibility.

I. AMENDMENTS

Amendments to this agreement may be proposed at any time by either party and shall become effective upon written approval by both parties.

DATED: 4/29/83 /s/ Gordon C. Trombley, Director
Department of Lands

DATED: 6/20/83 /s/ Tom Coston, Regional Forester
Region 1

DATED: 6/17/83 /s/ J. S. Tixler, Regional Forester
Region 4

APPENDIX L

AGREEMENT AND MEMORANDUM OF UNDERSTANDING

This is an intergovernmental cooperative agreement between the State of Oregon, acting by and through the Department of Geology and Mineral Industries, hereinafter termed, "DOGAMI," and the United States of America, acting by and through the Forest Service (Regions 5 and 6) of the Department of Agriculture, hereinafter termed the "Forest Service."

RECITALS

1. DOGAMI administers the Reclamation of Mining Lands Act (ORS Chapter 517), which is intended to allow the mining of valuable minerals in a manner consistent with the protection, reclamation, and subsequent beneficial use of the land so mined.

2. Pursuant to 36 CFR 252, the Forest Service has a program similar to that of DOGAMI for administering National Forest lands located in the State of Oregon.

3. DOGAMI and Forest Service desire to avoid a duplication of regulations, inspections, reclamation plans, and costs to miner-operators, the public, and both Governments and to further provide for an efficient, centralized, regulatory program to serve the needs of both DOGAMI and the Forest Service and to insure proper protection and reclamation of National Forest lands located in the State of Oregon.

SCOPE

1. This Agreement and Memorandum of Understanding covers new surface mining sites on National Forest lands for loctable minerals, leasable minerals, and common variety minerals but not sites excluded from ORS 517 such as on-site road construction, excavations for access road construction and maintenance, mining in the beds or banks of any waters in the state, or underground mines.

2. Mining operations currently operating under State mined land reclamation permits shall continue to operate under State authority until reclamation has been completed.

COVENANTS

1. Providing the requirements of the Oregon Reclamation of Mining Lands Act (ORS 517.750-517.990) and the regulations issued thereunder are met, mineral material permits, prospecting permits, operating plans under the 1872 Act Use Regulations, and separate reclamation plans, together with the ancillary bonding or other financial arrangements approved by the Forest Service that such permit is also approved by DOGAMI. Written response shall be provided by DOGAMI within 20 days of receipt of an operating plan.

2. Forest Service shall immediately upon receipt send to DOGAMI copies of notices of intent to operate, reclamation plans, environmental assessments, operating plans, permits, bonds, or other financial arrangements in lieu of bonds, and other relevant documents concerning surface mining activities on National Forest lands. These documents shall be sent to the Supervisor, Mined Land Reclamation Program, Oregon Department of Geology and Mineral Industries, 1129 S.E. Santiam Road, Albany, Oregon 97321.

3. If the Forest Service determines that any surface mining operation on National Forest land is not subject to Forest Service regulations, DOGAMI shall be notified immediately of such determination by the Forest Service for any action it deems appropriate under ORS Chapter 517.

4. If DOGAMI determines that the Forest Service is not enforcing surface mined land reclamation as provided in approved reclamation plans, DOGAMI shall enforce ORS 517.750-517.990.

5. The Forest Service shall advise DOGAMI of its intention to release a bond 20 days prior to the release. DOGAMI has the opportunity to make an inspection within the 20-day period, and if the reclamation has not been satisfactorily completed, DOGAMI

will so indicate to the Forest Service. Such deficiencies will be corrected or completed under Forest Service direction. If the reclamation is found to be satisfactorily completed, DOGAMI will so indicate and the bond will be released.

6. This Agreement shall supersede the Agreement dated October 9, 1973, and shall terminate on July 1, 1985, unless extended by mutual accord. This Agreement shall be amended only with the mutual consent of DOGAMI and the Forest Service.

7. This Agreement may be terminated by either DOGAMI or Forest Service upon 30 days written notice, upon which DOGAMI will jointly assume regulation of reclamation of surface mined lands on National Forests with Forest Service.

DATED: 1/15/81 /s/ Regional Forester Region 5

DATED: 10/31/80 /s/ Regional Forester Region 6

DATED: 3/12/81 /s/ State Geologist
Department of Geology and
Mineral Industries

APPENDIX M

MEMORANDUM OF UNDERSTANDING BETWEEN THE STATE OF UTAH, DIVISION OF OIL, GAS, AND MINING AND THE FOREST SERVICE, INTERMOUNTAIN REGION CONCERNING MINE RECLAMATION

WHEREAS, the State of Utah, Division of Oil, Gas, and Mining, may, in accordance with Section 40-8-1 et seq., Utah Code Annotated, require a lessee (State Lands) or operator conducting a mining operation (excluding conventional oil and gas operations and coal under privilege of a Federal lease) on lands owned by the U.S. Government and administered by the Department of Agriculture, Forest Service, to post a mining bond or revise an existing bond to assure reasonable reclamation of such lands;

AND WHEREAS, the Department of Agriculture, Forest Service, may, in accordance with the General Mining Law of 1872, as amended, and the provisions of 36 CFR 228, require such lessee (State minerals/Federal Surface) or operator conducting mining operations on National Forest System lands to post a reclamation bond or revise an existing bond to assure compliance with all terms and conditions of such lease, or operating plan, including required reclamation.

NOW THEN, let it be understood that posting of bond, by such lessee or operator, with the Department of Agriculture, Forest Service, shall satisfy bonding requirements of both of these agencies on condition of the following:

1. Upon review of the proposed operating plan and in consultation with the operator, the bond amount is as estimated and mutually agreed upon by the State of Utah, Division of Oil, Gas, and Mining, and the Department of Agriculture, Forest Service.

2. Acceptable forms of bonding are:

A. A surety bond with an approved corporate surety registered in Utah, and approved by the U.S. Department of Treasury (circular 570).

B. A cash deposit.

C. U.S. Treasury Note. Acceptable only in an amount of present market value and registered to the Department of Agriculture, Forest Service.

D. Irrevocable Letter of Credit issued by a bank which is (1) a member of the Federal Reserve Systems, or (2) insured by the Federal Deposit Insurance Corporation. (Exhibit A)

3. The bond requirement is to assure:

A. Compliance with the reclamation requirements of an approved operating plan.

B. Reasonable and appropriate reclamation upon termination of the operation.

4. If the Department of Agriculture, Forest Service, and the State of Utah, Division of Oil, Gas, and Mining, do not agree on an amount for the bond, either party may require a separate bond for the entire estimated amount notwithstanding the terms of this agreement.

A. A bond held by the Department of Agriculture, Forest Service, will not be released without written consent of the Director, State of Utah, Division of Oil, Gas, and Mining.

B. A bond held by the State of Utah, Division of Oil, Gas, and Mining will not be released without written consent of the Department of Agriculture, Forest Service.

5. This Memorandum may be amended by the agreement of both parties.

6. This Memorandum may be terminated by either party by giving thirty days notice of such intent to terminate.

The understanding outlined hereinabove is agreed to by the State of Utah, Division of Oil, Gas, and Mining, and the Department of Agriculture, Forest Service, Intermountain Region. This Memorandum of Understanding will become effective on the date of the last signature.

DATED: 11/26/84 /s/ Director
Division of Oil, Gas, and Mining
State of Utah

DATED: 10/24/84 /s/ Regional Forester
Intermountain Region
USDA Forest Service

APPENDIX N

AGREEMENT

Between Regions 1 and 6 of the Forest Service
and the State of Washington.

Regarding

Responsibilities on National Forest Lands Under the "Washington Surface-Mined Land Reclamation Act of February 12, 1970."

Surface Mining on National Forest Lands Will Come Under the Surveillance of the Washington Surface-Mined Land Reclamation Act in the Following Instances Only:

1. Minerals locatable under the general mining laws that are being removed from or being prospected for on unpatented mining claims.

2. All minerals and materials being removed from National Forest land in which the rights to the mineral or material are outstanding.

Coordination of Activities Coming Under the Washington Surface-Mined Land Reclamation Act:

1. The reclamation plans for surface-mined activities required by the Act shall be made in coordination with the Forest Supervisor.

2. The Forest Service will notify the State of Washington Division of Mines and Geology, Department of Natural Resources, Olympia, Washington, of any surface mining activity in the categories described in Numbers 1 and 2 above in which the removal from the excavation appears to be approaching 10,000 tons.

DATED: 3/2/71 /s/ NEAL M. RAHM,
Regional Forester, Region 1

DATED: 2/24/71 /s/ CHAS. A CONNAUGHTON.
Regional Forester, Region 6

DATED: 3/18/71 /s/ BERT L. COLE,
Commissioner of Public Lands,
State of Washington

APPENDIX O

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is entered into by and between the Forest Service, United States Department of Agriculture, acting by and through the Regional Foresters, Intermountain and Rocky Mountain Regions, and the State of Wyoming, acting by and through the Governor.

The purpose of this Memorandum is to eliminate duplication of reclamation bonding requirements for the use and reclamation of National Forest System lands incident to land-disturbing mineral exploration and mining operations. This memorandum applies to operations under: (1) the United States General Mining Laws; (2) Forest Service-issued special use and prospecting permits involving mineral resources, including geothermal, subject to disposal under the various Federal mineral leasing acts; (3) Forest Service-authorized operations by private parties involving common varieties of mineral materials for private use or sale; and (4) operations involving privately-owned minerals underlying National Forest System surface.

This memorandum does not apply to those operations authorized by mineral licenses, permits or leases, including coal leases, issued by the U.S. Department of the Interior. Separate bonding procedures apply to operations under such mineral leases, permits or licenses, and are administered for the United States by the Geological Survey or the Office of Surface Mining of the Department of the Interior.

Definitions.

1. "Mineral", "operation", "operator", and "reclamation" shall be defined as in the Wyoming Environmental Quality Act, WS 1977, S. 35-11-103.

2. "Administrator" shall mean the Administrator, Land Quality Division, Wyoming Department of Environmental Quality, or his authorized representative.

3. "Department" shall mean the Wyoming Department of Environmental Quality.

4. "Act" shall mean the Wyoming Department of Environmental Quality Act.

It is MUTUALLY AGREED AND UNDERSTOOD by and between the Forest Service and the Governor that:

1. The Forest Service, as the Federal agency responsible for the management of National Forest System lands, is responsible for the evaluation of proposals for land-disturbing mineral exploration and mining operations on National Forest System lands to determine their compliance with applicable Federal statutes and regulations and Forest Service policies and land management goals and objectives.

2. The Department is responsible for administering this agreement on behalf or the Governor.

3. The Forest Service is a surface owner within the meaning of the Act, Section 35-11-416.

4. The Department will hold and administer any performance bond, covering "affected land" of the National Forest System as defined in Sec. 35-11-103(e)(xvi) of the Act, required in accordance with the provisions of Sec. 35-11-417 of the Act and all pertinent rules and regulations. The Department will also hold and administer any bond that may be required, in addition to the performance bond, sufficient to protect the surface ownership interests of the United States in lands under the jurisdiction of the Forest Service, as provided in the Act, Sec. 35-11-416(a).

5. The "record mineral owner" provision of Sec. 35-1.1-417(b) of the Act shall not apply to the United States.

6. When a performance bond is required by the Act, its amount shall be established by the Administrator in accordance with the Act and all pertinent rules and regulations.

7. The performance bond shall be conditioned on meeting the reclamation requirements of the Forest Service-approved operating plan and any more stringent requirements of the State permit. This clause is not intended to require specific mention of the Forest Service operating plan in the State permit or the bond instrument, but to insure that Forest Service and State requirements are compatible, subject to the operator meeting such State requirements that may be more stringent than those of the Forest Service.

8. Bonds shall be released as provided by the Act, and all pertinent rules and regulations, and upon Forest Service agreement to release. The Administrator shall notify the Forest Service of the date and time of his inspection for evaluation of reclamation work, and shall offer the Forest Service the opportunity to accompany him on this inspection.

9. Adjustments to bonds, other than by release, shall be made in accordance with the operator's annual report, or as otherwise provided by the Act, and all pertinent rules and regulations. The Administrator shall notify the Forest Service of receipt of the operator's annual report within five (5) working days of said receipt, shall invite the Forest Service to review the annual report, and shall offer the Forest Service the opportunity to accompany him on the inspection which is made part of the annual report.

10. Nothing in this Memorandum shall prevent the Forest Service from requiring an operator to post an independent performance bond with the Forest Service whenever (a) the Department has determined that no bond is required pursuant to the Act, and all pertinent rules and regulations, or (b) the Forest Service determines that the bond posted with the Department is inadequate for the protection of National Forest System lands.

11. This Memorandum may be terminated by either party, for any reason, upon sixty (60) days notice to the other party, provided that written notice shall simultaneously be sent to any operator adversely affected by termination of this Memorandum.

DATED: /s/ Governor Ed Herschler

DATED: 10/22/80 /s/ Robert Sundin, Director D.E.Q.

DATED: 11/14/80 /s/ Regional Forester
Rocky Mountain Region

DATED: 2/2/81 /s/ Regional Forester
Intermountain Region

APPENDIX P

MEMORANDUM OF UNDERSTANDING
Surface Mining and Reclamation Coordination in
Del Norte County
Between
THE COUNTY OF DEL NORTE
and
SIX RIVERS NATIONAL FOREST,
U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE

THIS AGREEMENT, made and entered into by and between the County of Del Norte, through its Board of Supervisors, hereinafter called the County, and the Six Rivers National Forest, through its Forest Supervisor, hereinafter called the Forest Service.

WITNESSETH:

WHEREAS, local, state and federal agencies have certain interests in regulating surface effects of mining on federal public lands or on combinations of public and private lands, it is deemed advisable to develop a policy between the Forest Service and County to serve as guidance for both agencies in fulfilling their agency regulatory responsibilities in such situations.

WHEREAS, several major and numerous minor acts of Congress permit the extraction of minerals on lands under the jurisdiction of the Forest Service.

WHEREAS, the Forest Service has basic responsibility for management of the surface resources of National Forest lands on which operations take place under the authority of the 1872 Mining Law (16 USC 478, 551).

WHEREAS, there is a statutory right for persons to prospect and mine on National Forest System land open to operation of the 1872 Mining Law, providing they comply with the rules and regulations covering federal public lands involved.

WHEREAS, the surface effects of mining minerals on federal lands which are subject to lease by the federal government are of

concern to other federal agencies than those signatory to this agreement, it is not the intent of this agreement to apply to those minerals.

WHEREAS, the Forest Service will require that operations, conducted under the authority of the 1872 Mining Law, which might cause significant surface resource disturbance, shall be conducted under procedures identified in 36 CFR 252; and will attempt to minimize or prevent, mitigate and repair adverse environmental impacts on National Forest System resources by imposing reasonable conditions which do not materially interfere with such operations.

WHEREAS, lead agencies have the responsibility under the Surface Mining and Reclamation Act of 1975 (SMARA) and State policy for Surface Mining and Reclamation Practice to regulate surface mining and reclamation within their jurisdictions so as to assure that:

(1) Adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses,

(2) The production and conservation of minerals are encouraged, while giving consideration to values relating to recreation, watershed, wildlife, range and forage, and aesthetic enjoyment, and

(3) Residual hazards to the public health and safety are eliminated.

NOW, THEREFORE, the Forest Service and the County hereby understand and agree that the following will satisfy the aforesaid concerns and the requirements of the aforesaid laws and are acceptable to both the Forest Service and the County. It is agreed that in regulation of surface mining of the subject minerals on public or on combination of public and private lands:

(1) The County and the Forest Service will work cooperatively to insure, as practicable, that conditions required of operators in minimizing adverse environmental impacts conform to applicable local, state and federal regulations, and

(2) The County may accept as functional equivalents to its requirements under SMARA, operating plans, reclamation plans and environmental studies submitted pursuant to federal regulation when such plans and studies meet or exceed minimum statewide standards set by the Mining and Geology Board in its state policy for Surface Mining and Reclamation Practice, and alternatively,

(3) Forest Service may accept as functional equivalents to its requirements documents relating to operating plans, reclamation plans and environmental studies submitted to the County when such plans and studies meet or exceed minimum standards set by USDA regulations and the Forest Service Manual.

The Forest Service Will:

1. Notify the County whenever it requests or receives an operating plan for a mining operation on National Forest land within Del Norte County that involves either the removal of more than 1,000 cubic yards of minerals, ores, and overburden or involves more than one acre in any one location, and

2. Provide the County notice of development of Environmental Assessment Reports for mining operating plans and give the County opportunity to provide information, advice and recommendations for such reports.

The County Will:

1. Notify the Forest Service whenever it receives an application for a permit to mine which comes under the purview of SMARA on private lands within and adjacent to the National Forest, and

2. Provide the Forest service notice of development of mining reclamation plans on areas within or adjacent to National Forest land and give the Forest Service opportunity to provide information, advice and recommendations for such plans, and for permits to mine.

The Forest Service and County Will:

1. Jointly review and coordinate operating plans, reclamation plans and permits for those mining operations that include both National Forest and private lands. The objective of the review and coordination process will be to arrive at common requirements in operating plans and permits and to keep procedural impacts on the miner to a minimum.

This agreement shall continue in force until terminated by either party upon thirty (30) days notice, in writing to the other, of their intention to terminate the agreement upon a date specified.

DEL NORTE COUNTY

DATED: 5/28/80 /s/ Chairman, County Board of Supervisors

FOREST SERVICE

DATED: 4/28/80 /s/ Forest Supervisor
Six Rivers National Forest

APPENDIX Q

MEMORANDUM OF UNDERSTANDING
Surface Mining and Reclamation Coordination in Fresno County

Between

THE COUNTY OF FRESNO

and

SIERRA AND SEQUOIA NATIONAL FORESTS

U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE

THIS AGREEMENT, made and entered into by and between the County of Fresno, through its Board of Supervisors, hereinafter called the County, and the Sierra and Sequoia National Forests, through their Forest Supervisors, hereinafter called the Forest Service.

WITNESSETH:

WHEREAS, local, State, and Federal agencies have certain interests in regulating surface effects of mining on Federal public lands or on combinations of public and private lands, it is deemed advisable to develop a policy between the Forest Service and the County to serve as guidance for both agencies in fulfilling their agency regulatory responsibilities in such situations.

WHEREAS, several major and numerous minor acts of Congress permit the extraction of minerals on lands under the jurisdiction of the Forest Service; and

WHEREAS, the Forest Service has basic responsibility for management of the surface resources of National Forest lands on which operations take place under the authority of the 1872 Mining Law (16 USC 478, 551); and

WHEREAS, there is a statutory right for persons to prospect and mine on National Forest System land open to operation of the 1872 Mining Law, providing they comply with the rules and regulations covering Federal public lands involved; and

WHEREAS, the surface effects of mining minerals on Federal lands which are subject to lease by the Federal government are of concern to other Federal agencies than those signatory to this agreement, it is not the intent of this agreement to apply to those minerals.

WHEREAS, the Forest Service will require that operations, conducted under the authority of the 1872 Mining Law, which might cause significant surface resource disturbance, shall be conducted under procedures identified in 36 CFR 252; and will attempt to minimize or prevent, mitigate and repair adverse environmental impacts on National Forest System resources by imposing reasonable conditions which do not materially interfere with such operations.

WHEREAS, lead agencies have the responsibility under the Surface Mining and Reclamation Act of 1975 (SMARA) and State policy for Surface Mining and Reclamation Practice to regulate surface mining and reclamation within their jurisdiction so as to assure that:

(1) Adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses.

(2) The production and conservation of minerals are encouraged, while giving consideration to values relating to recreation, watershed, wildlife, range and forage, and aesthetic enjoyment, and

(3) Residual hazards to the public health and safety are eliminated.

NOW, THEREFORE, the Forest Service and the County hereby understand and agree that the following will satisfy the aforesaid concerns and the requirements of the aforesaid laws and are acceptable to both the Forest Service and the County. It is agreed that in regulation of surface mining of the subject minerals on public or on combination of public and private lands:

(1) The County and the Forest Service shall work cooperatively to insure, as practicable, that conditions required of operators in minimizing adverse environmental impacts conform to applicable local, State and Federal regulations, and

(2) The County may accept as functional equivalents to its requirements under SMARA, operating plans, reclamation plans and environmental studies submitted pursuant to Federal regulation when such plans and studies meet or exceed minimum statewide standards set by the Mining and Geology Board in its State policy for Surface Mining and Reclamation Practice, and alternatively,

(3) Forest Service may accept as functional equivalents to its requirements documents relating to operative plans, reclamation plans and environmental studies submitted to the County when such plans and studies meet or exceed minimum standards set by USDA regulations and the Forest Service Manual.

The Forest Service Will:

1. Notify the County whenever it requests or receives an operating plan for a mining operation on National Forest land within the County that involves either the removal of more than 1,000 cubic yards of minerals, ores, and overburden or involves more than one acre in any one location, and

2. Provide the County notice of development of Environmental Assessment Reports for mining operating plans and give the County opportunity to provide information, advice, and recommendations for such reports.

The County Will:

1. Notify the Forest Service whenever it receives an application for a permit to mine which comes under the purview of SMARA on private lands within and adjacent to the National Forest, and

2. Provide the Forest Service notice of development of mining reclamation plans on areas within and adjacent to National Forest land and give the Forest Service opportunity to provide information, advice and recommendations for such plans, and for permits to mine.

The Forest Service and County Will:

1. Jointly review and coordinate operating plans, reclamation plans and permits for those mining operations that include both National Forest and private lands. The objective of the review and coordination process will be to arrive at common requirements in operating plans and permits and to keep procedural impacts on the miner to a minimum.

This agreement shall continue in force until terminated by either party upon thirty (30) days notice, in writing to the other, of their intention to terminate the agreement upon a date specified.

The foregoing resolution was passed and adopted by the Board of Supervisors of the County of Fresno, State of California, this 11th day of December, 1979, by the following vote to wit:

AYES: Supervisors Bronzan, Huey, Donaldson, Levy, Johnson

NOES: None

ABSENT. None

ATTEST:

Allan Colman
Clerk of the Board
of Supervisors

By: /s/ _____
Dec. 18, 1979

Approved as to Legal Form:

By: /s/ _____
Oct.4, 1979

COUNTY OF FRESNO

By: /s/ Chairman
Board of Supervisors
Dec. 18, 1979

FOREST SERVICE

By: /s/ Forest Supervisor
Sierra National Forest
Nov. 21, 1979

By: /s/ Forest Supervisor
Sequoia National Forest
Nov. 16, 1979

APPENDIX R

MEMORANDUM OF UNDERSTANDING
Surface Mining and Reclamation Coordination in Inyo County
Between
THE COUNTY OF INYO
and
INYO NATIONAL FOREST,
U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE

THIS AGREEMENT, made and entered into by and between the County Inyo through its Board of Supervisors, hereinafter called the County, and the Inyo National Forest, through its Forest Supervisor, hereinafter called the Forest Service.

WITNESSETH:

WHEREAS, local, state and federal agencies have certain interests in regulating surface effects of mining on federal public lands or on combinations of public and private lands, it is deemed advisable to develop a policy between the Forest Service and the County to serve as guidance for both agencies in fulfilling their agency regulatory responsibilities in such situations.

WHEREAS, several major and numerous minor acts of Congress permit the extraction of minerals on lands under the jurisdiction of the Forest Service.

WHEREAS, the Forest Service has basic responsibility for management of the surface resources of National Forest Lands on which operations take place under the authority of the 1872 Mining Law (16 USC 478, 551).

WHEREAS, there is a statutory right for persons to prospect and mine on National Forest System land open to operation of the 1872 Mining law, providing they comply with the rules and regulations covering federal public lands involved.

WHEREAS, the surface effects of mining minerals on federal lands which are subject to lease by the federal government are of concern to other federal agencies than those signatory to this

agreement, it is not the intent of this agreement to apply to those minerals.

WHEREAS, the Forest Service will require that operations, conducted under the authority of the 1872 Mining Law, which might cause significant surface resource disturbance, shall be conducted under procedures identified in 36 CFR 252; and will attempt to minimize or prevent, mitigate and repair adverse environmental impacts on National Forest System resources by imposing reasonable conditions which do not materially interfere with such operations.

WHEREAS, lead agencies have the responsibility under the Surface Mining and Reclamation Act of 1975 (SMARA) and State Policy for Surface Mining and Reclamation Practice to regulate surface mining and reclamation within their jurisdictions so as to assure that:

(1) Adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses,

(2) The production and conservation of minerals are encouraged, while giving consideration to values relating to recreation, watershed, wildlife, range and forage, and esthetic enjoyment, and

(3) Residual hazards to the public health and safety are eliminated.

NOW, THEREFORE, the Forest Service and the County hereby understand and agree that the following will satisfy the aforesaid concerns and the requirements of the aforesaid laws and are acceptable to both the Forest Service and the County. It is agreed that in regulation of surface mining of the subject minerals on public or on combination of public and private lands:

(1) The County and the Forest Service shall work cooperatively to insure, as practicable, that conditions required of operators in minimizing adverse environmental impacts conform to applicable local, state and federal regulations, and

(2) The County may accept as functional equivalents to its requirements under SMARA, operating plans, reclamation plans and environmental studies submitted pursuant to federal regulation when such plans and studies meet or exceed minimum statewide standards set by the Mining and Geology Board in its state policy for surface Mining and Reclamation Practice, and alternatively,

(3) Forest Service may accept as functional equivalents to its requirements documents relating to operating plans, reclamation plans and environmental studies submitted to the County when such plans and studies meet or exceed standards set by USDA regulations and the Forest Service Manual.

The Forest Service Will:

1. Notify the County whenever it requests or receives an operating plan for a mining operation on National Forest land with Inyo County that involves more than one acre in any one location or involves the removal of over 1,000 cubic yards of minerals, ores, mineral material or overburden, and

2. Provide the County notice of development of Environmental Assessment Reports for mining operating plans and give the County opportunity to provide information, advice and recommendations for such reports.

The County Will:

1. Notify the Forest Service whenever it receives an application for a permit to mine which comes under the purview of SMARA on private or Inyo National Forest lands within and adjacent to the National forest, and

2. Provide the Forest Service notice of development of mining reclamation plans on areas within or adjacent to National Forest land and give the Forest Service opportunity to provide information, advice and recommendations for such plans, and for permits to mine.

The Forest Service and County Will:

1. Jointly review and coordinate operating plans, reclamation plans and permits for those mining operations that include both National Forest and private lands. That objective of the new review and coordination process will be to arrive at common requirements in operating plans and permits and to keep procedural impacts on the miner to a minimum.

This agreement shall continue in force until terminated by either party upon thirty (30) days notice, in writing to the other, of their intention to terminate the agreement upon a date specified. This agreement may be amended or modified by written agreement between both parties.

DATED: 4/22/80 INYO COUNTY

/s/ Chairman, County Board of Supervisors

DATED: 6/6/80 FOREST SERVICE

/s/ Forest Supervisor
Inyo National Forest

APPENDIX S

MEMORANDUM OF UNDERSTANDING

Surface Mining and Reclamation Coordination in Madera County

Between

THE COUNTY OF MADERA

and

SIERRA AND INYO NATIONAL FORESTS

U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE

THIS AGREEMENT, made and entered into between the County of Madera, through its Board of Supervisors, hereinafter called the County, and the Sierra and Inyo National Forests, through their Forest Supervisors, hereinafter called the Forest Service.

WITNESSETH:

WHEREAS, local, state, and federal agencies have certain interests in regulating surface effects of mining on federal public lands or on combinations of public and private lands, it is deemed advisable to develop a policy between the Forest Service and the County to serve as guidance for both agencies in fulfilling their agency regulatory responsibilities in such situations.

WHEREAS, several major and numerous minor acts of Congress permit the extraction of minerals on lands under the jurisdiction of the Forest Service.

WHEREAS, the Forest Service has basic responsibility for management of the surface resources of National Forest lands on which operations take place under the authority of the 1872 Mining Law (16 USC 478,551).

WHEREAS, there is a statutory right for persons to prospect and mine on National Forest System land open to operation of

the 1872 Mining Law, providing they comply with the rules and regulations covering federal public lands involved.

WHEREAS, the surface effects of mining minerals on federal lands which are subject to lease by the federal government are of concern to other federal agencies than those signatory to this agreement, it is not the intent of this agreement to apply to those minerals.

WHEREAS, the Forest Service will require that operations, conducted under the authority of the 1872 Mining Law, which might cause significant surface resource disturbance, shall be conducted under procedures identified in 36 CFR 252; and will attempt to minimize or prevent, mitigate and repair adverse environmental impacts on National Forest System resources by imposing reasonable conditions which do not materially interfere with such operations.

WHEREAS, lead agencies have the responsibility under the Surface Mining and Reclamation Act of 1975 (SMARA) and State policy for Surface Mining and Reclamation Practice to regulate surface mining and reclamation within their jurisdiction so as to assure that:

(1) Adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses,

(2) The production and conservation of minerals are encouraged, while giving consideration to values relating to recreation, watershed, wildlife, range and forage, and aesthetic enjoyment, and

(3) Residual hazards to the public health and safety are eliminated.

NOW, THEREFORE, the Forest Service and the County hereby understand and agree that the following will satisfy the aforesaid concerns and the requirements of the aforesaid laws and are acceptable to both the Forest Service and the County. It is agreed that in regulation of surface mining of the subject minerals on public or on combination of public and private lands:

(1) The County and the Forest Service shall work cooperatively to insure, as practicable, that conditions required of operators in minimizing adverse environmental impacts conform to applicable local, state and federal regulations, and

(2) The County may accept as functional equivalents to its requirements under SMARA, operating plans, reclamation plans and environmental studies submitted pursuant to federal regulation when such plans and studies meet or exceed minimum statewide standards set by the Mining and Geology Board in its state policy for Surface Mining and Reclamation Practice, and alternatively,

(3) Forest Service may accept as functional equivalents to its requirements documents relating to operating plans, reclamation plans and environmental studies submitted to the County when such plans and studies meet or exceed minimum standards set by USDA regulations and the Forest Service Manual.

The Forest Service Will:

1. Notify the County whenever it requests or receives an operating plan for a mining operation on National Forest land within the County, that involves either the removal of more than 1,000 cubic yards of minerals, ores, and overburden or involves more than one acre in any one location, and

2. Provide the County notice of development of Environmental Assessment Reports for mining operating plans and give the County opportunity to provide information, advice and recommendation for such reports.

The County Will:

1. Notify the Forest Service whenever it receives an application for a permit to mine which comes under the purview of SMARA on private lands within and adjacent to the National Forest, and

2. Provide the Forest Service notice of development of mining reclamation plans on areas within or adjacent to National Forest land and give the Forest Service opportunity to provide informa-

tion, advice and recommendations for such plans, and for permits to mine.

The Forest Service and County Will:

1. Jointly review and coordinate operating plans, reclamation plans and permits for those mining operations that include both National Forest and private lands. The objective of the review and coordination process will be to arrive at common requirements in operating plans and permits and to keep procedural impacts on the miner to a minimum.

This agreement shall continue in force until terminated by either party upon thirty (30) days notice, in writing to the other, of their intention to terminate the agreement upon a date specified.

DATED: July 24, 1979

MADERA COUNTY
/s/ Chairman,
County Board
of Supervisors

DATED: September 14, 1979

FOREST SERVICE
/s/ Forest Supervisor
Sierra National Park

DATED: August 30, 1979

/s/ Forest Supervisor
Inyo National Forest

APPENDIX T

MEMORANDUM OF UNDERSTANDING
Surface Mining and Reclamation Coordination
in Modoc County

Between

THE COUNTY OF MODOC;
U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Redding District

And

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE
MODOC NATIONAL FOREST

THIS AGREEMENT, made and entered into by and between the County of Modoc, through its Board of Supervisors, hereinafter called the County, the Modoc National Forest, through its Forest Supervisor, hereinafter called the Forest Service, and the Bureau of Land Management, Redding District, California, through its District Manager, hereinafter called the BLM.

WITNESSETH:

WHEREAS, local, state and federal agencies have certain interests in regulating surface effects of mining on federal public lands or on combinations of public and private lands, it is deemed advisable to develop a policy between the BLM, the Forest Service and the County to serve as guidance for these agencies in fulfilling their agency regulatory responsibilities in such situations.

WHEREAS, several major and numerous minor acts of Congress permit the extraction of minerals on lands under the jurisdiction of the Forest Service and the BLM.

WHEREAS, the Forest Service has basic responsibility for management of the surface resources of National Forest lands on which operations take place under the authority of the 1872

Mining Law (16 USC 478, 551) and the BLM has similar responsibilities on public lands under its jurisdiction.

WHEREAS, there is a statutory right for persons to prospect and mine on National Forest System land and BLM administered public land open to operation of the 1872 Mining Law, providing they comply with the rules and regulations covering federal public lands involved.

WHEREAS, the surface effects of mining minerals on federal lands which are subject to lease by the federal government are of concern to other federal agencies than those signatory to this agreement, it is not the intent of this agreement to apply to those minerals.

WHEREAS, the Forest Service will require that operations, conducted under the authority of the 1872 Mining Law, which might cause significant surface resource disturbance, shall be conducted under procedures identified in 36 CFR 252; and will attempt to minimize or prevent, mitigate and repair adverse environmental impacts on National Forest System resources by imposing reasonable conditions which do not materially interfere with such operations.

WHEREAS, the BLM will require that operations under the authority of the 1872 Mining Law, which might cause significant surface resource disturbance, shall be conducted under authority established by the Federal Land Policy and Management Act of 1976.

WHEREAS, local agencies have the responsibility under the California Surface Mining and Reclamation Act of 1975 (SMARA) and State policy for Surface Mining and Reclamation Practice to regulate surface mining and reclamation within their jurisdictions, so as to assure that:

1. Adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses,

2. The production and conservation of minerals are encouraged, while giving consideration to values relating to recrea-

tion, watershed, wildlife, range and forage, and aesthetic enjoyment, and

3. Residual hazards to the public health and safety are eliminated.

NOW, THEREFORE, the Forest Service and the Bureau of Land Management and the County hereby understand and agree that the following will satisfy the aforesaid concerns and the requirements of the aforesaid laws and are acceptable to the Bureau of Land Management, the Forest Service and the County. It is agreed that in regulation of surface mining of the subject minerals on public or on combination of public and private lands:

1. The parties to this memorandum shall work cooperatively to insure, as practicable, that conditions required of operators in minimizing adverse environmental impacts conform to applicable local, state and federal regulations, and

2. The county may accept as functional equivalents to its requirements under SMARA, operating plans, reclamation plans and environmental studies submitted pursuant to federal regulation when such plans and studies meet or exceed minimum statewide standards set by the Mining and Geology Board in its state policy for Surface Mining and Reclamation Practice, and alternatively,

3. Forest Service and BLM may accept as functional equivalents to their requirements documents relating to operating plans, reclamation plans and environmental studies submitted to the County when such plans and studies meet or exceed minimum standards set by USDA regulations and the Forest Service Manual and/or USDI/BLM regulations when promulgated.

The Forest Service and BLM will:

1. Notify the County whenever they request or receive an operating plan for a mining operation on National Forest or BLM administered land within Modoc County that involves either the removal of more than 1,000 cubic yards of minerals, ores, and overburden or involves more than one acre in any one location, and

2. Provide the County notice of development of Environmental Assessment Reports for mining operating plans and give the County opportunity to provide information, advice and recommendations for such reports. The County understands that exemptions in SMARA regarding the surface mining of one acre or less and 1,000 cubic yards or less do not apply to operations on national forest or BLM administered lands.

The County will:

1. Notify the Forest Service and/or the BLM whenever it receives an application for a permit to mine which comes under the purview of SMARA on private lands within and adjacent to the National Forest and/or BLM administered land, and

2. Provide the Forest Service and/or BLM notice of development of mining reclamation plans on areas within or adjacent to National Forest and/or BLM opportunity to provide information, advice and recommendations for such plans, and for permits to mine.

The Forest Service, BLM and County will:

1. Jointly review and coordinate operating plans, reclamation plans and permits for those mining operations that include both National Forest or BLM administered land and private lands. The objective of the review and coordination process will be to arrive at common requirements in operating plans and permits and to keep procedural impacts on the miner to a minimum.

This agreement shall continue in force until terminated by either party upon thirty (30) days notice, in writing to the other, of their intention to terminate the agreement upon a date specified.

DATED: September 15, 1979

COUNTY OF MODOC

/s/ Chairman,
Modoc County
Board of Supervisors

DATED: September 14, 1979

FOREST SERVICE

/s/ Forest Supervisor
Modoc National Forest

DATED: September 19, 1979

BUREAU OF LAND MANAGEMENT

/s/ District Manager
Redding District

MOTION

(6)

No. 85-1200

Supreme Court, U.S.
FILED
MAR 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

CALIFORNIA COASTAL COMMISSION, ET AL.,
Appellants,

VS.

GRANITE ROCK COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

MOTION TO DISMISS OR AFFIRM

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No. 85-1200

In the Supreme Court

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United States

OCTOBER TERM, 1985

CALIFORNIA COASTAL COMMISSION, ET AL.,
Appellants,

VS.

GRANITE ROCK COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

MOTION TO DISMISS OR AFFIRM

Appellants California Coastal Commission et al. (hereafter "Coastal Commission") have filed an attempted appeal under 28 U.S.C. § 1254(2), from the decision of the United States Court of Appeals for the Ninth Circuit,[1] (hereafter "Court of Appeals"), which reversed an order of the District Court for the Northern District of California. For the reasons set forth below the appeal should be dismissed for lack of jurisdiction, since the Court of Appeals did not hold a specific state statute to be invalid

[1] The Ninth Circuit Court of Appeals' opinion is reported at 768 F.2d 1077 (9th Cir. 1985) and is set forth at pages A-1 through A-10 of the Appendix to Granite Rock Company's Motion to Dismiss or Affirm (hereafter "G.R. App."). The District Court's opinion is reported at 590 F.Supp. 1361 (N.D. Cal. 1984) and is set forth at pages A-11 through A-32 of the California Coastal Commission's Appendix to Jurisdictional Statement (hereafter "C.C. App.").

as repugnant to the Constitution, treaties, or laws of the United States, as § 1254(2) requires. See Part II(A). If the appeal is treated as an application for Writ of Certiorari, the Writ should be denied. See Part II(B).

In the alternative, assuming arguendo an appeal is appropriate, the decision of the Court of Appeals should be affirmed. See Part III.

I
STATEMENT OF THE CASE

The only issue decided by the Court of Appeals was that the Coastal Commission could not prohibit Appellee Granite Rock Company (hereafter "Granite Rock") from continuing its federally-approved and regulated mining operations on unpatented mining claims on federal lands by requiring Granite Rock to obtain a state permit. The Court of Appeals held that the extensive scheme of regulation established in federal mining laws and implemented in administrative regulations preempts independent state permit authority over Granite Rock's mining activities.

Granite Rock[2] mines chemical grade white limestone on unpatented mining claims in the Los Padres National Forest at Pico Blanco, California. *Granite Rock Company v. California Coastal Commission*, 768 F.2d at 1079; G.R. App. p. A-2 (hereafter *"Granite Rock v. C.C.C."*). Granite Rock began mining the claim in 1981, after the United States Forest Service (hereafter "Forest Service") approved its five-year (1981-1986) Plan of Operations,[3] which it submitted pursuant to applicable Forest Service regulations. *Id.*[4]

---

[2] Pursuant to the United States Sup. Ct. Rule 28.1, 28 U.S.C. (1984), there are no parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Granite Rock Company.

[3] This Plan of Operations on its terms expires in 1986.

[4] 36 C.F.R. §§ 228.1-228.15 (1985), which regulations are adopted under the authority of the Organic Administration Act of June 4, 1897, 16 U.S.C. §§ 478, 551 (1971). The purpose of the Forest Service regulations is "to set forth rules and procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws (30 U.S.C. §§ 21-54), which confer a statutory right to enter upon the public lands to search for minerals, shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources." 36 C.F.R. § 228.1. See C.C. App. pp. A-42 through A-55.

On October 17, 1983, after Granite Rock had operated without Coastal Commission's objection for over two years, the Coastal Commission demanded that Granite Rock obtain a state permit in order to continue its mining operations on federal lands. October 17, 1983 letter to Granite Rock from the Coastal Commission; G.R. App. pp. A-11 through A-12. Granite Rock immediately brought this action for declaratory and injunctive relief to prevent the Coastal Commission from enforcing the state permit requirement. The District Court denied Granite Rock's motion for summary judgment and dismissed the action. *Granite Rock v. C.C.C.*, 590 F.Supp. 1361 (N.D. Cal. 1984); C.C. App. pp. A-11 through A-32.

In its succinct and well-reasoned opinion, based on existing precedent, the Court of Appeals reversed, holding that independent state permit authority is preempted by the federal mining laws[5] and United States Forest Service regulations.[6] The Court of Appeals recognized that the Forest Service is vested with the power to authorize or prohibit initiation or continuation of mining on federal forest lands pursuant to the federal mining laws and administrative regulations. It accordingly held that independent state permit authority is equivalent to impermissible state veto power, and is thus preempted.

---

[5] Act of May 10, 1872, codified as amended at 30 U.S.C. §§ 21-54 (1971). Amendments include the Mining and Mineral Policy Act of 1970, 30 U.S.C. § 21a (1982). See also the Surface Resources and Multiple Use Act of 1955, 30 U.S.C. § 601 *et seq.* (1971); the Multiple Mineral Development Act of 1954, 30 U.S.C. § 521, *et seq.* (1971); the Mining Claims Occupancy Act, 30 U.S.C. § 701, *et seq.* (1971); and the Federal Mine Health and Safety Act of 1977, 30 U.S.C. § 801, *et seq.* (West Supp. 1985). See C.C. App. A-37 through A-41.

[6] See Footnote 4.

". . . We conclude that Forest Service regulations mandate that the power to prohibit the initiation or continuation of mining on national forests for failure to abide by applicable environmental requirements lies with the Forest Service."

• • •

"[A]n independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority and is thus preempted."

Granite Rock v. C.C.C., 768 F.2d at 1083, G. R. App. p. A-9.

The Coastal Commission erroneously asserts that the question presented is whether all state environmental regulation of private mining on federal forest land is preempted. (Jurisdictional Statement, Questions Presented). The Court of Appeals did not reach such a broad issue. The holding of preemption below is limited to independent state permit authority over the initiation or continuation of federally-approved mining operations on federal lands. As is apparent from even a cursory reading of the opinion, the Court of Appeals' decision did not invalidate all state environmental regulation over federal lands. See Part III *infra*.

II

MOTION TO DISMISS

A. The Appeal Must Be Dismissed As Appellate Jurisdiction Does not Lie Under § 1254(2)

Numerous decisions of this Court hold that appellate jurisdiction under 28 U.S.C. § 1254(2) is proper only when a state statute is expressly invalidated, and does not lie in situations such as the present case, when the state's exercise of authority is struck down without reference to a specific statute. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 (1984). *See also Burger King Corporation v. Rudzewicz*, ____ U.S. ____, 105 S.Ct. 2174, 2181 n.12 (1985); *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 42-43 (1983).

Here, the Court of Appeals did not strike down a specific provision of the California Coastal Act, but merely held that the Coastal Commission's purported exercise of land use permitting

authority over Granite Rock's mining activities on federal land was preempted. *Granite Rock v. C.C.C.*, 768 F.2d at 1083, G.R. App. pp. A-9 through A-10.

As this Court recently stated in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 247:

"[W]e have consistently distinguished between those cases in which a state statute is expressly struck down on constitutional grounds and those in which an exercise of authority under state law is invalidated without reference to the state statute. The former come within the scope of § 1254(2)'s jurisdictional grant. The latter do not." [citations omitted].

Thus, this appeal should be dismissed for lack of jurisdiction. The Court of Appeals' decision is only reviewable, if at all, by Writ of Certiorari. 28 U.S.C. § 2103 (1982).

B. There Are No "Special and Important Reasons" for Granting Review by Writ of Certiorari

Review by this Court on Writ of Certiorari is not a matter of right and is only granted when there "are special and important reasons therefor." United States Sup. Ct. Rule 17, 28 U.S.C. (1984). Specific reasons include: (a) conflict between the Court of Appeals and another Federal Court of Appeals or a state court of last resort; (b) conflict between the Court of Appeals and applicable decisions of this Court, or (c) when the Court of Appeals has decided an important question of federal law which has not been, but should be decided by this Court.

Neither these reasons nor any other persuasive reasons are present herein. The Court of Appeals did not decide a case of first impression, but followed precedent and maintained the historic state and federal balance of power over mining activities on federal lands.

The Court of Appeals' decision below is not in conflict with the decision of any other Federal Court of Appeals. It exactly follows the rationale of another cogent decision of the same Federal Court of Appeals, *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979) which was summarily affirmed by this Court at 445 U.S. 947 (1980). It is also in line with California

Supreme Court decisions. *People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.*, 38 Cal.3d 509 (1985); *cert. denied* No. 85-615 (March 3, 1986).

Moreover, the holding of the Court of Appeals follows earlier decisions of this Court. See *Granite Rock v. C.C.C.*, 768 F.2d at 1081-1083, G.R. App. pp. A-6 through A-10, discussing *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152 (1946); *Sperry v. State of Florida*, 373 U.S. 379 (1963); and *Pacific Gas & Electric v. State Energy Resources Conserv.*, 461 U.S. 190 (1983). See also *Federal Power Commission v. State of Oregon*, 349 U.S. 435, 444-445 (1955).

III

MOTION TO AFFIRM

A. Decision Below is Plainly Correct

The Court of Appeals' decision is plainly correct and should be summarily affirmed. It follows binding precedent of this Court which rejected the same dual system of permit authority sought by the Coastal Commission.

This Court has consistently held that when pursuant to Congressional authority, a federal agency grants a permit, license or other approval to an activity, the state may not subsequently superimpose its own licensing or permit requirements over the federally sanctioned activity. *Sperry v. State of Florida*, 373 U.S. at 385; *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. at 164. These cases upheld the concept of cooperative federalism but rejected dual use permit authority.

First Iowa Hydro-Electric Coop. v. Federal Power Company, 328 U.S. at 164, is illustrative:

> "To require the petitioner to secure the actual grant to it of a State permit under Section 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the

> 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government."[7]

This Court found state "veto power" in conflict with the federal scheme and thus preempted by the United States Constitution. 328 U.S. at 181.

The Court of Appeals followed this precise rationale in rejecting the Coastal Commission's argument that the mining laws and Forest Service regulations establish a dual permit system:

> "We find unpersuasive the argument that the Mining Act and these regulations do no more than encourage mining subject to minimum federal environmental regulation, leaving the states free to condition the ability to mine on adhering to more stringent requirements."

Granite Rock v. C.C.C., 768 F.2d at 1083, G.R. App. p. A-9.

Ventura County v. Gulf Oil Corp., 601 F.2d at 1080 (9th Cir. 1979), *aff'd* 445 U.S. 947 (1980) presents an identical legal issue to that resolved in this case and is directly on point herein. In *Ventura*, the Court of Appeals for the Ninth Circuit held that the requirement that Gulf Oil apply for a county permit for its federally approved activities was preempted, reasoning that even a temporary delay in federally authorized mining while an operator applied for a state permit was an impermissible veto.

> "The federal government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress."
>
> * * *
>
> "Ventura cannot bring an action seeking immediate recognition and implementation of its veto power over the govern-

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[7] See also *Federal Power Commission v. State of Oregon*, 349 U.S. at 445 [state veto power "would result in the very duplication of regulatory control precluded by the *First Iowa* decision."] The rule in *First Iowa* was recently cited with approval by this Court in *Pacific Gas and Electric v. State Energy Resources*, 461 U.S. 190 (1983).

ment's lessee and successfully contend that an adverse ruling would require 'seeking out conflict' unnecessarily. The issue is whether Ventura has the power of ultimate control over the Government's lessee, and this issue persists whether or not a use permit would eventually be granted."

Ventura County v. Gulf Oil Corp., 601 F.2d at 1084-1085.

By urging the reversal of the Court of Appeals' decision, the Coastal Commission is urging this Court to ignore existing law, to drastically alter the existing federal-state balance, and to reverse existing precedent of this Court and of the Court of Appeals.

The Coastal Commission's statement that as a result of the Court of Appeals' opinion, it has no environmental regulatory authority over federal lands, is plainly wrong. The Court of Appeals accurately defined the Coastal Commission's regulatory role.

> "The Forest Service regulations recognize that a state may enact environmental regulations in addition to those established by federal agencies. See 36 C.F.R. § 228.8 (1984); *see also* 16 U.S.C. § 551a. Moreover, a state may urge the Forest Service to withhold or revoke a federal mining permit from a miner who does not abide by all applicable state and federal standards. But an independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority and thus is preempted."

Granite Rock v. C.C.C., 768 F.2d at 1083, G.R. App. p. A-9.

The Court of Appeals' opinion upheld existing law by affirming the Forest Service's responsibility and authority to apply federal and state environmental laws to private mining activity on unpatented mining claims on federal lands through the federal permit system. The affirmation affords the Forest Service the power to assure the reasonableness of the overall regulatory mix. *Granite Rock v. C.C.C.*, 768 F.2d at 1083, G.R. App. pp. A-9 through A-10.

B. Court of Appeals Correctly Applied Preemption Law

Contrary to the Coastal Commission's assertions, (Jurisdictional Statement, pp. 21-25) the Court of Appeals' application of

well-established general preemption law to the case at bar was proper. Specifically, the Court of Appeals found that there was an actual conflict between the exercise of federal and state permit authority over unpatented mining claims on federal lands.

> "... state law is still preempted to the extent it actually conflicts with federal law, that is, ... where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984) (citations omitted)."

Granite Rock v. C.C.C., 768 F.2d at 1080, G.R. App. p. A-3. See also *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Pacific Gas and Electric v. State Energy Resources Conserv.*, 461 U.S. at 204; *Ventura County v. Gulf Oil Corp.*, 601 F.2d at 1086.

C. Actual Conflict Exists

The Coastal Commission's contention (Jurisdictional Statement, pp. 25-26) that there is no actual conflict because state regulation has not been applied is erroneous and disingenuous.

In its answer to the complaint filed in the district court, the Coastal Commission admitted[8] that the issue decided by the Court of Appeals is "ripe" for review.

> "The only state agency regulation that has been asserted against Granite Rock by defendants is that under the Coastal Act of 1976, Cal. Public Resources Code section 30000 *et seq.* and the CZMA. Therefore the only actual controversy that is ripe involves the applicability of solely these statutes and no others."

Coastal Commission answer, p. 8. G.R. App. p. A-19.

This identical argument was also raised by the Coastal Commission before the Court of Appeals. In response, the Court of

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[8] A party's assertion in a pleading is a judicial admission which binds the party throughout the course of the proceeding. *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 528 (2d Cir. 1985); 9 Wigmore, Evidence § 2589 at 822 (Chadbourn Rev. 1981).

Appeals found that this case presents an actual conflict in that an additional permit system would conflict with and undermine federal permit authority. *Granite Rock v. C.C.C.*, 768 F.2d at 1082, G.R. App. p. A-7. The Court of Appeals recognized that the power to require a permit is the power to prohibit.

> "We applied the same reasoning in *Ventura County v. Gulf Oil Corp.* ... We determined that there was an actual conflict between local and federal governments because 'the Ventura authorities wish[ed] to regulate conduct which Congress has authorized.' Id. [*Ventura County v. Gulf Oil Corp.*, 601 F.2d at 1084] We reasoned that the Departments of Interior and Agriculture had already issued federal permits, and thus 'Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.' "

Granite Rock v. C.C.C., 768 F.2d at 1082, G.R. App. p. A-8.

IV
CONCLUSION

In this appeal, the Coastal Commission seeks judicial expansion of its regulatory powers over unpatented mining claims on federal lands into the power to grant or deny permits. Congress, through the federal mining laws and Forest Service regulations, has balanced competing interests through an extensive regulatory framework which substantially provides for local concerns without sacrificing national objectives. A grant to the Coastal Commission of veto power over mining activities on federal lands would upset this balance. Such a grant of authority also squarely conflicts with this Court's holding in *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, as well as the Court of Appeal's decision in *Ventura County v. Gulf Oil Corporation*, which was affirmed by this Court.

We respectfully submit that the Coastal Commission lacks jurisdiction to maintain this appeal. Alternatively, we submit that the Coastal Commission presents no substantial question for the consideration of this Court and that the decision of the Court of Appeals should be affirmed without further review.

DATED: March 7, 1986.

Respectfully submitted,

BARBARA R. BANKE
Counsel of Record
JESS S. JACKSON
BURTON J. GOLDSTEIN
GOLDSTEIN, BARCELOUX & GOLDSTEIN
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Granite Rock Company
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Of Counsel

(Appendices follow)

APPENDIX A

In the United States Court of Appeals
For the Ninth Circuit

No. 84-2146
D.C. No. CV 83-5137 WWS

[Filed Aug. 14, 1985]

Granite Rock Company, a corporation,

Plaintiff-Appellant,

vs.

California Coastal Commission, an Administrative Agency of the State of California,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding
Argued and Submitted March 14, 1985
San Francisco, California

OPINION

Before: WALLACE and POOLE, Circuit Judges, and STEPHENS,* District Judge.

WALLACE, Circuit Judge:

Granite Rock Company (Granite Rock) appeals the district court's refusal to enjoin the California Coastal Commission (Coastal Commission) from requiring Granite Rock to obtain a state permit in order to continue mining on federally owned forest land. *Granite Rock Co. v. California Coastal Commission,* 590 F.Supp. 1361 (N.D. Cal. 1984) (*Granite Rock*). We have jurisdiction under 28 U.S.C. § 1291. We reverse.

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* Honorable Albert Lee Stephens, Jr., United States District Judge, Central District of California, sitting by designation.

I

Granite Rock is engaged in the business of mining chemical grade white limestone. Its mining operations involved in this appeal are located on an unpatented mining claim on land owned by the federal government in the Los Padres National Forest at Pico Blanco. Granite Rock acquired the mining claim at Pico Blanco in 1959 pursuant to the Act of May 10, 1872, ch. 152, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C.) (Mining Act). It began mining the claim in 1981 after the United States Forest Service (Forest Service) approved its five-year plan of operations, which it had submitted as required for significant mining activities pursuant to regulations implemented under the Act of June 4, 1897, ch. 2, 30 Stat. 11, 35 (codified as amended in scattered sections of 16 U.S.C.) (Organic Administration Act).

In 1983, the Coastal Commission advised Granite Rock that the California Coastal Act, Cal. Pub. Res. Code §§ 30000-30900 (West 1977 & Supp. 1985) (Coastal Act), required the company to obtain a state permit to continue its mining operations. The California legislature passed the Coastal Act in 1976 pursuant to the state's inherent police powers, as a reenactment of a 1972 initiative, and as an implementation of the federal Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (CZMA), which encourages state regulation of coastal zones. Granite Rock brought this action for declaratory and injunctive relief to prevent the Coastal Commission from enforcing the state permit requirement. Because there were no factual issues in dispute, Granite Rock brought a motion for summary judgment challenging the state's legal authority to require the permit.

The district court denied Granite Rock's motion for summary judgment and then dismissed the action. *Granite Rock*, 590 F.Supp. at 1364, 1375. The court first reasoned that the land on which Granite Rock's claim was located did not fall within the CZMA's exclusion from the state's coastal zone. *Id.* at 1367-70. The district judge then concluded that the permit requirement was valid because states have concurrent legislative authority with Congress to regulate activities on federal lands within the coastal zone, the mining claim was not a federal enclave subject exclusively to federal regulation, and no federal statute or regulation

preempted the state requirement. *Id.* at 1371-74. Granite Rock appeals.

II

The property clause of the Constitution states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Granite Rock argues that this is a grant of exclusive legislative power to Congress. It argues that states acquire power to regulate the use of federally owned property only if Congress expressly grants this power to them. Thus, because the federal government holds the title to the land in question, Granite Rock argues that California had no inherent police power to regulate the mining activity. The Coastal Commission concedes that the property clause grants Congress legislative power over federal lands, but it argues that the power is not exclusive—that states have concurrent legislative power to regulate the use of federal lands unless and until Congress affirmatively exercises its property clause power to preempt state regulation. We need not resolve this dispute over the proper interpretation of the property clause, however, if Congress has exercised its power to preempt the state's permit requirement. We, therefore, turn initially to that issue.

The Supreme Court recently articulated the test for federal preemption:

> [S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615, 621 (1984) (citations omitted) (*Silkwood*).

Granite Rock argues that the state permit requirement is preempted either by the CZMA or by the Mining Act and certain Forest Service regulations promulgated under the Organic Administration Act. It contends that the CZMA preempts the state permit requirement because the CZMA evidences an intent on the part of Congress to reserve exclusively to itself the power to regulate the use of lands excluded from the coastal zone and because the CZMA excludes the land in question. Granite Rock argues that the Mining Act and Forest Service regulations preempt the permit requirement because the requirement stands as an obstacle to the accomplishment of the full purposes and objectives of the statute and regulations. It contends that the purpose of the Mining Act is to encourage mining and that the state permit requirement is an obstacle to accomplishing this purpose either because the state will prohibit mining altogether on the land in question or because it will condition a permit on unreasonable state environmental requirements.

The Coastal Commission argues that none of the federal law relied on by Granite Rock preempts the state permit requirement. It contends that the CZMA does not exclude the land in question from its coastal zone and thus, instead of preempting the permit requirement, the CZMA actually authorizes it. The Coastal Commission argues that if a previous act of Congress could conceivably be read as preempting the permit requirement, the CZMA neutralizes its effect over land within the coastal zone. The Coastal Commission also argues that the Mining Act does not preempt state environmental regulation of federal lands unless the regulation prohibits mining altogether and that the question whether the Coastal Commission will refuse Granite Rock's permit application based on a per se policy of prohibiting mining at Pico Blanco is not yet ripe.

We need not decide whether the CZMA evidences a congressional intent to take exclusive power over regulating the use of any federal lands excluded from the coastal zone if the Coastal Commission's argument that the CZMA neutralizes the preemptive effect of other federal law over lands within the coastal zone is incorrect. Under these circumstances, the Mining Act and

Forest Service regulations provide a narrower ground for us to decide the preemption issue in this case.

A.

The legislative intent is clear on whether the CZMA neutralizes other federal law which might preempt the state. The Conference Committee stated that "[t]he Conferees . . . adopted language which would make certain that there is no intent in this legislation to change Federal or state jurisdiction or rights in specified fields." Conf. Rep. No. 1544, 92d Cong., 2d Sess.____, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4822, 4824. This passage refers to section 307(e)(2) of the CZMA, 16 U.S.C. § 1456(e)(2), which states that "[n]othing in this chapter shall be construed . . . as superseding, modifying, or repealing existing laws applicable to the various Federal agencies."

Similarly, the Senate Report demonstrates Congress' intent not to restore state authority within the coastal zone if a federal act otherwise preempts it over a specific subject matter. In its statement of the CZMA's purpose, the Senate explained that the CZMA is merely a cooperative funding provision that "has as its main purpose the encouragement and assistance of States in preparing and implementing management programs to preserve, protect, develop and whenever possible restore the resources of the coastal zone of the United States." S. Rep. No. 753, 92d Cong., 2d Sess. ____, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4776, 4776. The Senate indicated that the CZMA is designed to promote this purpose of "enhanc[ing] state authority," *id.*, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4776, through the means of providing "Federal grants-in-aid to coastal states to develop coastal zone management programs [and] . . . grants to help coastal states implement these management programs once approved." *Id.*, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4776. *See also Secretary of the Interior v. California*, 104 S. Ct. 656, 659 (1984) (*Secretary of the Interior*). These grants were intended only to give coastal states an incentive "*to exercise their full authority* over the lands and waters in the coastal zone," 16 U.S.C. § 1451(h) (emphasis added), and not to

restore authority that the states might previously have lost through federal preemption. *See* S. Rep. No. 753, 92d Cong., 2d Sess. _____, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4795 ("There are no changes in existing law resulting from this legislation.").

Thus, even if we assume that the land in question falls within the coastal zone, the legislative history and certain provisions of the CZMA conclusively demonstrate that Congress intended the CZMA *not* to change the status quo with respect to the allocation of state and federal power over lands within the coastal zone. Moreover, Congress gave no indication that it perceived the status quo as limiting its power over such lands. *Cf.*, *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 657-60 (1982) (Congress' manifest perception of the status quo in subcontracting claims found to be accurate). Therefore, we now consider the preemptive effect of Mining Act and Forest Service regulations.

B.

The purpose of the Mining Act is to encourage mining on federal lands. *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981) (*Weiss*); *see also United States v. Goldfield Deep Mines Co.*, 644 F.2d 1307, 1309 (9th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). In 1970, Congress renewed its adherence to this policy, although it also declared its fidelity to the additional goal of lessening any adverse environmental impact from such mining. 30 U.S.C. § 21a. Then, in 1974, the Secretary of Agriculture promulgated regulations " 'to minimize adverse environmental impacts on National Forest System surface resources' that can be caused by mining, while, at the same time, not interfering with the rights conferred by the mining laws." *Weiss*, 642 F.2d at 297, *quoting* 36 C.F.R. § 252.1 (1975) (recodified at 36 C.F.R. § 228.1 (1984)). *See generally* 36 C.F.R. pt. 228 (1984). These regulations require miners to notify the Forest Service of any mining related operation that is likely to "cause disturbance of surface resources." *Id.* § 228.4(a). "The initiation or continuation of such an operation is subject to the approval of the Forest Service." *Weiss*, 642 F.2d at 297. *See* 36 C.F.R. §§ 228.4-.5 (1984).

Although a general federal purpose to encourage a particular activity does not automatically preempt state environmental regulation that incidentally discourages the activity, *see, e.g.*, *Silkwood*, 104 S. Ct. at 626; *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 220-23 (1983) (*Pacific Gas*); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633 (1981), we disagree with the Coastal Commission's converse argument that a state regulation which prohibits mining unless the miner obtains a state permit automatically escapes preemption if issuance of the permit is conditioned only on reasonable requirements. In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946) (*First Iowa*), the Supreme Court held that the Federal Power Act, which establishes a federal permit system authorizing the construction of hydroelectric dams, preempted a state law that prohibited such activity unless the petitioner first obtained a state permit. The Court reasoned that

> [t]o require the petitioner to secure the actual grant to it of a state permit . . . as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the "comprehensive" planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.

Id. at 164 (footnote omitted). The Court applied the same reasoning in *Sperry v. Florida*, 373 U.S. 379 (1963), to hold that a federal patent regulation, which governed the issuance of federal permits allowing the preparation and prosecution of patent applications, preempted a state law that prohibited such activity unless a state permit to practice law was first obtained. *Id.* at 385. In neither case did the Court make a prohibition/regulation distinction and inquire into the reasonableness of the state's conditions for issuing or denying the permit. The additional permit system was preempted simply because it would undermine the federal permit authority.

We applied the same reasoning in *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980), to hold that the Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-287, preempted a county zoning ordinance that prohibited oil exploration and extraction activities on federal land unless a county permit was first obtained. 601 F.2d at 1084. We determined that there was an actual conflict between local and federal governments because "the Ventura authorities wish[ed] to regulate conduct which Congress has authorized." *Id.* We reasoned that the Departments of Interior and Agriculture had already issued federal permits, and thus "Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress." *Id.*

The Court has recognized that the *First Iowa* doctrine extends only to state permit mechanisms that actually intrude into the sphere of federal permit authority. Thus, in *Pacific Gas* the Court held that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2394, did not automatically prevent California from prohibiting the construction of nuclear power plants unless a state permit was first obtained certifying that adequate storage facilities and means of disposal was available for nuclear waste. *See* 461 U.S. at 203-23. Although the Atomic Energy Act gives the Nuclear Regulatory Commission the authority to issue building permits if the construction and operation of a given nuclear power plant would be safe, the Court found that the specific state permit requirement addressed only economic and not safety concerns. *See id.* at 217-20. The Court expressly rejected the argument that states may prohibit new construction of nuclear power plants "until [their] safety concerns are satisfied by the Federal Government." *Id.* at 212. Thus, because the Atomic Energy Act does not give the Nuclear Regulatory Commission "comprehensive planning responsibility" beyond safety and into economic planning and because the state provision "d[id] not interfere with the type of plant that could be constructed," the Court held that the *First Iowa* doctrine did not apply. *Id.* at 223 n.34.

In deciding whether the *First Iowa* doctrine applies in this case, we must determine whether federal law establishes authority in a federal agency to prohibit or permit mining in national forests

conditioned on meeting environmental protection standards and, if so, whether the state permit authority exercised in this case intrudes into that sphere of authority. We conclude that Forest Service regulations mandate that the power to prohibit the initiation or continuation of mining in national forests for failure to abide by applicable environmental requirements lies with the Forest Service. 36 C.F.R. §§ 228.4-.5 (1984). We find unpersuasive the argument that the Mining Act and these regulations do no more than encourage mining subject to minimum federal environmental regulation, leaving the states free to condition the ability to mine on adhering to more stringent requirements. *See, e.g., State ex rel. Andrus v. Click*, 97 Idaho 791, ____, 554 P.2d 969, 974 (1976). On the other hand, we do not believe they go so far as to occupy the field of establishing environmental standards, striking a federally determined balance between encouraging mining and protecting the environment in national forests. The Forest Service regulations recognize that a state may enact environmental regulations in addition to those established by federal agencies. *See* 36 C.F.R. § 228.8 (1984); *see also* 16 U.S.C. § 551a. Moreover, a state may urge the Forest Service to withhold or revoke a federal mining permit from a miner who does not abide by all applicable state and federal standards. But an independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority and thus is preempted.

Our conclusion is bolstered by the fact that even the Forest Service is limited in the amount of regulation it may impose as a condition of mining in national forests because of the federal policy to encourage mining on federal lands. *See Weiss*, 642 F.2d at 299; *see also* 30 U.S.C. § 21a; 36 C.F.R. § 228.5(a) (1984). To allow a second tier of permit authority to be exercised by the states would undermine the Forest Service's ability to keep the applicable environmental requirements within the range of reasonableness. *See Weiss*, 642 F.2d at 299; 36 C.F.R. § 228.5(a) (1984). Current federal law allows the states to establish environmental standards that the Forest Service will apply in exercising its permit authority. *See id.* § 228.8. But by reserving final permit authority in the Forest Service, *see id.* §§ 228.4-.5, it also affords the Forest Service the power necessary to promote the federal

purpose of maintaining the reasonableness of the overall regulatory mix. *See* 30 U.S.C. § 21a; 36 C.F.R. § 228.5(a) (1984).

Our conclusion is not affected by the fact that the Forest Service staff stated in its environmental assessment of Granite Rock's plan of operation that "Granite Rock is responsible for obtaining any necessary permits which may be required by the California Coastal Commission." *Granite Rock*, 590 F.Supp. at 1374. A routine staff statement cannot change the effect of the formally adopted regulations.

REVERSED.

Appendix B

California Coastal Commission
CENTRAL COAST DISTRICT
701 Ocean Street, Room 310
Santa Cruz, CA 95060
(408) 426-7390

October 17, 1983

Mr. Bruce Woolpert, President
Granite Rock Company
P.O. Box 151
Watsonville, California 95077

Re: Pico Blanco Mining Activities

Dear Mr. Woolpert:

This letter is to advise you that the surface mining and related development activities at Pico Blanco within Los Padres National Forest are subject to the regulatory provisions of the California Coastal Act of 1976 and the federal Coastal Zone Management Act of 1972, as amended ("CZMA").

As you know, our agency has been studying this jurisdictional question for some time. Our review of relevant facts and law indicates that these mining activities clearly come within the ambit of the comprehensive coastal zone regulatory regime established by these federal and state laws. Because of the significant control and authority enjoyed by Granite Rock Company over the land subject to its mining claims at Pico Blanco and the concommitant significant dimination of federal discretionary control, this land cannot be included among the federal lands excluded from the coastal zone by the CZMA (see 16 U.S.C. 1453). Consequently, because the land is located seaward of the coastal zone boundary established by the state legislature effective January 1, 1977, it is subject to the permit requirements of the California Coastal Act.

This letter will serve to notify Granite Rock of its obligation to apply to the Coastal Commission for a coastal development permit for any development, as defined in Section 30106 of the Coastal Act, at the site undertaken after the date of this letter.

Staff does not propose to recommend that the Commission undertake enforcement of the permit requirements for development already completed on this date. We ask that the permit application be submitted no later than November 15, 1983.

Our review of this matter has also indicated that approval by the U.S. Forest Service of plans of operation of mining activities such as those at the Pico Blanco site constitute granting of a federal license or permit, within the meaning of Section 1456(c)(3) of the CZMA. (See, also, 15 C.F.R. 930.51(a).) Accordingly, because the permit activities would affect the coastal zone, plans of operation are subject to the federal consistency requirements of the CZMA, and before any such plan can be approved for Pico Blanco mining activities it must be consistent with the California Coastal Management Program. The procedures governing this process appear in the federal regulations, 15 C.F.R. 930, Subpart D. A copy is enclosed for your convenience.

Granite Rock is hereby notified of its obligation to prepare and submit for Coastal Commission review and approval a certification of consistency with the state's coastal management program and for any future plan of operations or any future amendment of a plan of operation.

This office stands ready to assist you in whatever way we can in regard to these requirements. For this purpose or if you wish to discuss these matters, please feel free to contact me or staff counsel Mary Hudson in our San Francisco office (415) 543-8555.

Very truly yours,

/s/ EDWARD Y. BROWN
Edward Y. Brown
District Director

Appendix C

United States District Court
Northern District of California

No. C-83-5137 WWS

Granite Rock Company,

Plaintiff,

v.

California Coastal Commission, et al.,

Defendants.

Answer to Amended Complaint for Declaratory Relief and Injunction

Defendants Melvin Nutter, Carolyn McNeil, Steve MacElvaine, Donald McInnis, Marshall Grossman, George Shipp III, Thomas McMurray Jr., Michael Wornum, Robert Franco, Dorill Wright, Leo King, C. Patrick Callahan, Dr. Gordon F. Snow, Dwight Sanders, Susan Golding and Edward Brown ("defendants") answer the separately numbered paragraphs of the amended complaint of plaintiff Granite Rock Company ("Granite Rock") as follows:

First Clain for Relief
(Declaratory Relief 28 U.S.C. § 2201)

I

Defendants admit the allegations of this paragraph.

II

Defendants admit the allegations of this paragraph, except insofar as this paragraph suggests that the California Coastal Commission can be properly named a defendant in this action.

III

Defendants admit the allegations of this paragraph except that defendants deny that defendant Edward Brown or the individual Coastal Commissioner defendants are individually empowered to enforce the provisions of the California Coastal Act and the Federal Coastal Zone Management Act (CZMA). Defendants allege that the California Coastal Commission, acting as a collective body of individual Commissioners, is empowered to enforce said Acts.

IV

Defendants admit the allegations of this paragraph including the allegation that the Court has subject matter jurisdiction pursuant to 28 U.S.C. section 1331 (federal question).

V

Defendants lack sufficient knowledge and information as to the value of Granite Rock's right to conduct mining operations on its unpatented mining claims, and therefore defendants deny this allegation. Defendants also deny that Granite Rock has a right to conduct such operations free of Coastal Commission regulation under the Coastal Act and the Coastal Zone Management Act.

VI

Defendants admit that Granite Rock is engaged in the business of mining limestone in the Big Sur area of Monterey County, and that such activities are also being conducted on federal lands in the Los Padres National Forest. Defendants lack sufficient knowledge and information as to the patented or unpatented, or the perfected status of Granite Rock's mining claims, and therefore defendants deny the allegations of this paragraph to that extent.

VII

Insofar as this paragraph states only legal conclusions, no answer is required.

VIII

Insofar as this paragraph states only legal conclusions, no answer is required.

IX

Defendants admit that in 1981 the U.S. Forest Service accepted Granite Rock's Plan of Operations for the five year term of 1981-86. Except as admitted, defendants deny the remaining allegations of this paragraph.

X

Defendants admit that Granite Rock is currently conducting mining operations on federal lands, but deny the remaining allegations of this paragraph.

XI

Defendants admit that formal legal title to the subject federal lands is held by the Federal Government, subject to Granite Rock's mining claims on said lands. Except as admitted, defendants deny the remaining allegations of this paragraph.

XII

Defendants admit that pursuant to the regulations implementing the Coastal Zone Management Act, 15 C.F.R. section 930.54(a), a state agency must notify a federal agency and a federal permit applicant that the proposed activity for which a federal permit is sought, requires state agency review under the Coastal Zone Management Act. Defendants also admit that pursuant to 15 C.F.R. section 930.54(a), a state agency should provide such notification within 30 days of receiving actual notice

of the federal permit application, or else the state agency will waive its right to review the proposed activity. Defendants also admit that the Coastal Commission did not notify the Forest Service that Granite Rock's application for its 1981-86 Plan of Operations required Coastal Commission CZMA review within 30 days after the Commission received actual notice of Granite Rock's application for said Plan of Operation. Defendants also allege that they are waiving, and are not asserting or claiming any right to review Granite Rock's existing 1981-86 Plan of Operations under the CZMA. Defendants allege that they are only asserting and claiming a right to review any future Plan of Operations or any future amendment of Granite Rock's existing 1981-86 Plan of Operations, and that such claim as to future plans was stated in a October 17, 1983 letter from defendant Edward Brown to Granite Rock's president, Bruce Woolpert. Except as admitted, defendants deny the remaining allegations of this paragraph.

XIII

Defendants lack sufficient knowledge and information to answer the allegations of this paragraph and therefore deny said allegations.

XIV

Defendants admit that they contend:

1. That Granite Rock's limestone mining operations on federal land in the Los Padres National Forest are not excluded from the coastal zone by the CZMA;

2. That approval by the U.S. Forest Service of Plans of Operation for Granite Rock's mining activities constitute the granting of a federal license or permit within the meaning of the CZMA, 16 U.S.C. section 1456(c)(3), and that such mining operations in the Los Padres National Forest are subject to Coastal Commission review for consistency with California's federally-approved Coastal Zone Management Program;

3. That Granite Rock has an obligation to submit future applications for Plans of Operation and future amendments to Granite Rock's 1981-86 Plan of Operations to the Coastal Commission for review and a determination of consistency with California's federally-approved Coastal Zone Management Program; and

4. That said contentions were manifested to Granite Rock in an October 17, 1983 letter from defendant Edward Brown to Granite Rock's president, Bruce Woolpert, a copy of which is attached hereto as Exhibit A. Except as admitted, defendants deny the remaining allegations of this paragraph.

XV

Defendants admit that Granite Rock makes the contentions stated in this paragraph. Defendants however, deny the validity of said contentions, except that defendants do not contest that the Coastal Commission has waived its right to review Granite Rock's existing 1981-86 Plan of Operations for CZMA consistency purposes under the 30 day notification period of 15 C.F.R. section 930.54(a).

XVI

Defendants admit that Granite Rock desires a judicial determination of its rights and duties and a declaration to the effect stated in subparagraphs 1 through 4 of this paragraph, but defendants deny that Granite Rock is entitled to a substantive declaration of that kind. Defendants admit that an actual controversy has arisen and exists between defendants and Granite Rock as to:

1. Whether Granite Rock's mining operations, after the October 17, 1983 date of the letter from defendant Edward Brown to Granite Rock's president, are subject to the coastal permit requirements of the California Coastal Act, Cal. Public Resources Code section 30000 et seq.; and

2. Whether Granite Rock's future Plans of Operation and future amendments to Granite Rock's existing 1981-86 Plan of

Operations are subject to Coastal Commission consistency review under the CZMA.

Defendants also admit that a judicial declaration as to the actual controversy outlined above is necessary and appropriate at this time. Except as admitted, defendants deny the remaining allegations of this paragraph.

SECOND CLAIM FOR RELIEF
(Injunction Federal Rule 65)

I

Defendants incorporate herein their answers to paragraphs I through XVI of the First Cause of Action.

II

Defendants deny the allegations of this paragraph.

III

Defendants deny the allegations of this paragraph.

IV

Defendants deny the allegations of this paragraph.

V

Defendants deny the allegations of this paragraph, and specifically deny the the Coastal Commission has requested or is seeking to require Granite Rock to submit a certificate of consistency for Granite Rock's existing 1981-86 Plan of Operations.

VI

Defendants deny the allegations of this paragraph.

AFFIRMATIVE DEFENSES

Defendants allege the following separate and independent affirmative defenses;

No Actual Controversy

1. Insofar as the Complaint seeks a declaration that Granite Rock is not required to submit a consistency certification to the Coastal Commission under the CZMA for its existing 1981-86 Plan of Operations, no live actual controversy appropriate for judicial decision is presented because defendants do not contend that a consistency certification for the exisiting 1981-86 Plan of Operations is required.

Ripeness

2. Insofar as the complaint seeks a declaration that all state agency regulation of Granite Rock's mining operations is preempted by federal regulation of such activities, the action is overbroad and lacking in the requisite ripeness. The only state agency regulation that has been asserted against Granite Rock by defendants is that under the Coastal Act of 1976, Cal. Public Resources Code section 30000 et seq. and the CZMA. Therefore the only actual controversy that is ripe involves the applicability of solely these statutes and no others.

WHEREFORE, defendants pray that:

1. Granite Rock be denied the injunctive, declaratory and other relief that it seeks;

2. That the Court declare:

a. That Granite Rock's mining operations conducted after October 17, 1983 are subject to the coastal permit requirements of the California Coastal Act, Cal. Public Resources Code section 30000 et seq.; and,

b. That Granite Rock's future Plans of Operation for its mining operations and future amendments to Granite Rock's existing 1981-86 Plan of Operations are subject to Coastal Commission consistency review under the CZMA; and

4. That defendants be awarded such other and further relief as the Court deems just and proper.

Dated: 1/6/84

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REPLY

BRIEF

No. 85-1200

Supreme Court, U.S.
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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

CALIFORNIA COASTAL COMMISSION, et al.,

Appellants,

v.

GRANITE ROCK COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

APPELLANTS' REPLY BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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36 C.F.R. § 228.8(h) 7

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APPELLANTS' REPLY BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

I.

THE NINTH CIRCUIT'S DECISION SQUARELY CONFLICTS WITH THE DECISIONS OF THE IDAHO AND WYOMING SUPREME COURTS AND THE APPELLATE COURT OF OREGON

The Ninth Circuit's decision in this case squarely conflicts with the decisions of the Supreme Courts of Idaho

and Wyoming and the intermediate appellate court of Oregon. See State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976) (Click I); State ex rel. Evans v. Click, 102 Idaho 443, 631 P.2d 614 (1981), cert. denied, 457 U.S. 1116 (1982) (Click II); Gulf Oil Corporation v. Wyoming Oil and Gas Conservation Commission, 693 P.2d 227 (Wyo. 1985); State ex rel. Cox v. Hibbard, 31 Ore. App. 269, 570 P.2d 1190 (1977). These state Supreme Court and appellate decisions uphold state environmental permit regulation of private mining on federal land and reject the claim that such state permit regulation is preempted by either the 1872 Mining Act, 30 U.S.C. §§ 22-54, or the Forest Service regulations, 36 C.F.R. §§ 228.1-228.15. See Click I, 554 P.2d at 972-977; Click II, 631 P.2d at 616-618; Gulf Oil

Corporation, 693 P.2d at 234-238; State ex rel. Cox, 570 P.2d at 1192-1195.

Granite Rock and its mining industry amici totally ignore these decisions, and make no attempt to reconcile them with, or distinguish them from the Ninth Circuit's decision in this case. The Ninth Circuit's decision and these state court decisions cannot be reconciled and are plainly in conflict.

California, along with eight other Western state amici, urge this Court to resolve this deadlock. The regulatory issue in this case affects thousands of mining claims on millions of acres of federal forest land throughout the West. The issue impacts a host of state statutes which provide for state environmental permit regulation of private mining on federal land, see appellants' jurisdictional

statement ("JS"), p. 7, n. 5, and it affects the validity and effectiveness of numerous cooperative agreements between the federal government and the Western states which recognize independent state mining permit regulation on federal land, see JS, p. 7, n. 6, p. 16, n. 13. This Court must resolve this controversy.

II.

THE NINTH CIRCUIT'S PER SE PREEMPTION RULE OF NO DUAL FEDERAL AND STATE PERMITTING IS PLAINLY ERRONEOUS AND RADICALLY ALTERS THE ESTABLISHED SYSTEM OF DUAL COOPERATIVE FEDERAL AND STATE REGULATION UNDER THE 1872 MINING ACT

Granite Rock urges that the Ninth Circuit did not apply a per se preemption rule of no dual federal and state permitting, but instead "found that there was an actual conflict" between federal and state permit regulation. Motion to dismiss or affirm, p. 9. But neither the Ninth Circuit nor Granite Rock have ever identified what this purported "actual conflict" is. There is

no claim nor finding that it is impossible for Granite Rock to obtain both federal and state permits, or that state permit requirements would prevent compliance with Forest Service requirements, or that state regulation interferes with any Forest Service surface protection objectives or any other federal regulatory interest. The only "actual conflict" put forth by Granite Rock is the notion that state permit regulation (regardless of what that regulation may be) simply "undermine[s]" or conflicts with federal permit authority. Id., p. 10.

Thus, Granite Rock's argument is a tour de force of circular reasoning: the Ninth Circuit did not apply a per se rule of no dual permitting but found an "actual conflict" because an actual conflict

necessarily occurs whenever there is dual permitting.

The Ninth Circuit did apply a per se preemption rule of no dual permitting. That rule is wrong because this Court has upheld dual permitting and licensing authority by the federal government and the states in a multitude of cases. See cases cited in JS, p. 22, n. 22.

While dual federal and state permitting may have been inappropriate for hydroelectric power plants authorized under the Federal Power Act, see First Iowa Hydro-Electric Corp. v. Federal Power Commission, 328 U.S. 152 (1946), or in determining patent practice eligibility before the U.S. Patent Office, see Sperry v. State of Florida, 373 U.S. 379 (1963), that does not begin to answer the preemption question under

this particular mining regulatory regime.[1]

Preemption turns on the specifics of each regulatory program in issue. When one looks at this mining regime one finds that the 1872 Mining Act is replete with provisions authorizing state regulation, see JS, pp. 10-11. One finds that the Forest Service's own surface use regulations specifically allow parallel state permit regulation, 36 C.F.R. § 228.8(h), see JS, p. 15. One finds that the Forest Service has entered into a host of

---

1. As explained in appellants' jurisdictional statement, Ventura County v. Gulf Oil Corporation, 601 F.2d 1080 (9th Cir. 1979), aff'd mem., 445 U.S. 947 (1980) involved an entirely different regulatory program which implicated fundamentally different federal interests, and it concerned an impermissible prohibition or local "veto" which is not involved here. See JS, pp. 24-25. Ventura is no more instructive here than First Iowa or Sperry.

formal agreements with the states that acknowledge and rely on state permit regulation, JS, p. 7, n. 6, pp. 15-16, JS Appendix, pp. A-90, A-97, A-99, A-108, A-110-111, A-115, A-119, A-123, A-127, A-131. One finds that the Bureau of Land Management's parallel surface use regulations, BLM's statements to the mining industry, and BLM's administrative practice under the 1872 Mining Act establish that state environmental regulation is not preempted, JS, pp. 13-14. And one finds that the Forest Service - in this very case - told Granite Rock that it should obtain state permits, including a coastal permit, for its operations, JS pp. 4-5. That is the evidence under this particular regulatory regime. None of that evidence is disputed or questioned by Granite Rock. In these circumstances, the mining industry's contention that state permit

regulation must be struck down to protect the federal government's authority is contradicted by all the indicia of Congressional and federal intent which establish that state regulatory authority does not interfere with federal authority and is not preempted.

Because the Ninth Circuit and the mining industry erroneously disregard the overwhelming evidence of non-preemptive intent in this case, because the issue has such importance for the sovereign interests of the states, and because the Ninth Circuit's decision so clearly conflicts with other state court decisions, California and the Western state amici urge this Court to review and ultimately reverse the Ninth Circuit's decision.

DATED: March 11, 1986

Respectfully submitted,

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No. 85-1200

UNITED STATES SUPREME COURT

October Term, 1985

CALIFORNIA COASTAL COMMISSION, ET AL.,
Appellants,

v.

GRANITE ROCK COMPANY,
Appellee,

On appeal from the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE STATES OF ALASKA, ARIZONA, HAWAII, MONTANA, NEW MEXICO, OREGON, UTAH, WYOMING AND THE TERRITORY OF AMERICAN SAMOA AS AMICI CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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INTRODUCTION AND SUMMARY

This appeal raises important issues concerning the scope of state power to mitigate the effects of uses of federal lands. All of the states joining in this amicus brief have a keen interest in this matter, if for no other reason than federal lands comprise a substantial, even dominant, portion of the lands within their borders. See Public Land Statistics (Bureau of Land Management, 1983), Table 7, p. 10. As this Court has recognized, the activities taking place on these lands, comprising one-third of the national land base, often have profound influence on the economy and the overall quality of life in these states. See United States v. New Mexico, 438 U.S. 696, 699 (1978).

In this case the Court of Appeals for the Ninth Circuit held that a state law requiring the Granite Rock Company

to secure a permit from the California Coastal Commission before engaging in mining in a coastal area of a national forest had been preeempted by the federal Mining Law of 1872, 30 U.S.C. § 21, et seq., and by regulations adopted in 1974 by the United States Forest Service pursuant to the so-called 1897 Organic Act for national forest management, 16 U.S.C. § 551a, 36 C.F.R. § 228. See 768 F.2d 1077. In reversing the district court's decision that the state permit requirement had not been preempted, see 590 F.Supp. 1361 at 1372-74 (N.D.Cal. 1984), the Court of Appeals acknowledged that the Mining Law and the agency regulations did not "go so far as to occupy the field of establishing environmental standards, striking a federally determined balance between encouraging mining and protecting the environment in national forests." 768 F.2d at 1083. But by finding the

state permit requirement preempted, the Court has eliminated the only practically effective way for state environmental standards to be applied to Granite Rock. Cf. Jones v. Rath Packing Co., 430 U.S. 519, 531, n. 18 (1977).

Amici states believe that this decision is so seriously flawed, in so important a context, as to merit reversal by this Court. It totally ignores the state-federal partnership in regulating mining activities on federal lands that predated adoption of the Mining Law by Congress in 1872, and that was ratified and carried forward by that law. It disregards numerous prior decisions of this Court and lower federal courts, dating back more than a century, confirming state power to regulate, tax, and prohibit mining operations on federal lands in order to carry out state laws and policies. It conflicts with a number of re-

cent decisions of the courts of three states, rendered in an identical context. It is inconsistent with the intent of Congress in giving the Forest Service regulatory authority over uses of the national forests, and with the Forest Service's intent in promulgating its regulations governing Mining Law activities. It runs directly counter not only to the letter and spirit of those regulations, but to the agency's practice under them. Finally, it is insensitive to the recent teachings of this Court on preemption.

The dispute at the heart of this case is hardly run-of-the-mill. The Mining Law applies to several hundred million acres of federal land in numerous states. See Office of Technology Assessment, Management of Fuel and Nonfuel Minerals in Federal Land (1979), Appendix B, Table B-2, p. 337 (hereafter "OTA Report"). Currently, well over one million

mining claims exist on these lands. Public Land Statistics (Bureau of Land Management, 1983), p. 145. Nearly all the affected states have laws creating permit systems and establishing environmental protection standards that they apply to mining claims on federal lands. See generally OTA Report, pp. 250-60.

This Court has consistently recognized that a state's interest in protecting the health of its economy and its natural environment is an intrinsic part of its sovereignty, see, e.g., Sporhase v. Nebraska, 458 U.S. 941 (1982), and that environmental protection is especially amenable to state regulation. See, e.g., Askew v. American Waterways Operators, 411 U.S. 325, 328-29, 332-37 (1973). Where, as in the American West, federal lands comprise much of the area within a state's borders, these legitimate concerns assume additional force.

Here, the Granite Rock Company owns fee land just outside the national forest, and mining claims just inside the forest boundary. Its mining of limestone is being conducted only on the federal mining claims. See Clerk's Docket Item 39, Exhibit A, Maps 1, 2; Exhibit C, p. 1. Had it been mining its fee property a few feet away, or had it obtained fee title to its claims under the Mining Law by paying a few dollars per acre, see 30 U.S.C. §§ 29, 37, it would have been fully subject to state Coastal Commission regulation, including the permit requirement of the California Coastal Act. See, e.g., Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 377 (1977).

The land involved is in a highly scenic area of the Big Sur coast, an important economic as well as natural resource to California and the nation. The

state regulatory scheme at issue here is, moreover, the kind of regulation of coastal land use encouraged by Congress in the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1421, et seq.[1/]

In historical context, this case presents a signal opportunity for this Court to restore a balance of federalism in the management of federal lands. Throughout much of the nation's history, states were recognized as having, as a matter of constitutional, statutory, and common law, significant power to regulate private activities on federal lands. The

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1. This Court's recent decision in Secretary of the Interior v. California, 464 U.S. 312 (1984), is not implicated in this case. That decision concerned the special "consistency" provisions of the CZMA applicable to the federal oil and gas leasing process on the Outer Continental Shelf, and did not raise any issue of regulating of private activities on onshore federal lands under the CZMA, the Mining Law, or any other statute.

constitutional protections for states in this context have largely disappeared, see Kleppe v. New Mexico, 426 U.S. 529 (1976), and are not at issue here.

But the statutory and common law protections states continue to enjoy depend upon vigilant judicial enforcement. In this case, however, the Ninth Circuit has sharply circumscribed state power and rather dramatically reworked the balance struck both by Congress, and by the executive branch in implementing Congress' will.

This case is particularly compelling because the basic statute at issue, the Mining Law of 1872, was enacted in an era when states were routinely accorded a meaningful role in regulating private activities on federal lands. The context of this case, then, bridges two eras, and offers an opportunity closely akin to the occasion this Court seized in California

v. United States, 438 U.S. 645 (1978), to restore substantial primacy to state water law systems. Unlike California, however, this case requires no rejection of dicta in its earlier decisions intervening between what might be called traditional federalism and its modern reaffirmation. See 438 U.S. at 670-75. Instead, the decision below is seriously at odds with both traditional and contemporaneous interpretation of the Mining Law.

The partnership this Court has helped restore between federal land management agencies and states has also found much contemporary favor in Congress and the agencies, for numerous recent statutes bear testimony to the continuing viability of state authority over activities conducted on those lands. See, e.g., 43 U.S.C. §§ 1712(c), 1720, 1732, 1765; and §§ 701(9)(2), (6), 90 Stat. 2786 (Federal Land Policy and Management Act).

Yet in this case the Ninth Circuit placed principal reliance on a forty-year-old decision of this Court, First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946), that arose under a far different statutory scheme, that did not involve federal lands, and whose significance for preemption on federal lands has been drastically undercut by more recent decisions of this Court like California v. United States. Unless reversed, however, the Ninth Circuit's aberrant decision here will prove influential in upsetting the balance that Congress, the federal agencies, and the courts have all struck in reconciling the states' ability to protect their legitimate concerns with the presence of huge tracts of federal land within their borders.

This case, then, allows this Court to make clear its attitude toward federal

preemption of state environmental regulatory power over private activities being conducted on federal lands, to inform the lower courts of the proper role of historical facts in deciding issues of preemption, and ultimately to emphasize, in the important context of federal land management as well as elsewhere, that the appropriate role for the courts is to "be careful to distinguish those situations in which concurrent exercise of a power by the Federal Government and the States . . . may possibly lead to conflicts and those situations where conflicts will necessarily arise." Goldstein v. California, 412 U.S. 546, 554 (1973) (emphasis in original).

ARGUMENT

I. THE NINTH CIRCUIT DECISION IGNORES THE HISTORICAL PARTNERSHIP BETWEEN THE STATE AND FEDERAL GOVERNMENT IN REGULATING ACTIVITIES CONDUCTED UNDER THE MINING LAW OF 1872 ON FEDERAL LANDS

If the term "cooperative federalism" had been in vogue in 1872, the Mining Law of 1872, like the Reclamation Act of 1902, see California v. United States, 438 U.S. 645, 650 (1978), would surely have qualified as a leading example of it. That Congress would preserve a meaningful role for the states in the Mining Law is scarcely surprising, given the setting in which Congress acted.

When gold was discovered at Sutter's mill in 1848, there was no federal mining law. See, generally, Swenson, Legal Aspects of Mineral Resources Exploitation, in Gates, History of Public Land Law Development (1968), pp. 708-723. Though the miners were technically tres-

passers on federal land, for nearly twenty years thereafter Congress completely abdicated the field, leaving it to the miners and the states and territories to regulate mining activities on federal land. Fittingly, California was the leader here, as it enacted and enforced several statutes governing mining activities on federal lands, see Swenson, p. 712, including one that sought to protect against environmental damage to other interests from mining. See Rocky Mountain Mineral Law Foundation, American Law of Mining (1st ed.), vol. 1, § 1.10, pp. 28-31.

When Congress finally stirred itself to legislate in 1866, 1870 and 1872, it sought principally to cure the awkward status of the miners as trespassers. Far from replacing the well-established system of non-federal regulation that had intervened, Congress instead basically

ratified it. See Jennison v. Kirk, 98 U.S. 453, 459 (1879). The Mining Law was not a dramatic departure from, but substantially a blessing of the status quo, one that included an active state regulatory role.

This is revealed not only by the statutory language, see e.g., 30 U.S.C. §§ 26, 28, Butte City Water Co. v. Baker, 196 U.S. 119, 123 (1905): 30 U.S.C. § 22 ("regulations prescribed by law," see, e.g., O'Donnell v. Glenn, 8 Mont. 248, 19 P. 302, 306 (1888)), but also by the legislative history of the 1866 Mining Act that was subsumed in the Mining Law of 1872. See, e.g., Cong. Globe, 39th Cong., 1st Sess. (1866), pp. 4021, 4053 (Rep. Ashley); pp. 3227, 3234 (Sen. Stewart); p. 3235 (Sen. Conness); p. 4054 (Sen. Higby). Opposition arguments that preserving state and legal regulatory authority would be confusing and ineffi-

cient, see id. p. 3453 (Sen. Williams), pp. 4049-50 (Rep. Julian), were soundly rejected. Thus, one part of the Mining Law, 30 U.S.C. § 51, which has become justly famous as establishing a tradition of federal deference to state water law, see California v. United States, 438 U.S. 645, 650-51 (1978), was originally merely a relatively obscure, unexceptional part of a general statute shot through with deference to state authority.

The Ninth Circuit utterly ignored this history, violating this Court's often-repeated admonition that the starting point for construing federal legislation "in a field which the states have traditionally occupied" is to presume that "the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218,

230 (1947).

This Court has also cautioned that the preemptive inquiry is into "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977). Here, the actual practice has fully embodied Congress' desire not to disturb seriously the state's preexisting exercise of regulatory power. The western states have collectively enacted hundreds of statutes over the years concerning location, maintenance and operations upon unpatented mining claims such as are involved in this case, and this Court has routinely upheld them. See, e.g., Butte City Water Co. v. Baker, 196 U.S. 119, 123-128 (1905) (collecting cases). Lower federal courts, including the Ninth Circuit, consistently followed this Court's lead. See, e.g., Northmore v. Simmons,

97 F. 386, 387-388 (9th Cir. 1899). Preemption existed only in the extremely rare case where state law flatly contradicted a specific requirement of the Mining Law. See Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co., 167 U.S. 108, 114-15 (1897). The decision below failed to consider this practice and the teachings of these decisions.

State power to regulate has not been limited to locating or maintaining federal mining claims. The Mining Law is silent on taxation, but this Court long ago decided that states could tax a claimant's possessory interests in mining claims, firmly rejecting a preemption argument. Forbes v. Gracey, 94 U.S. 762 (1877); see also Elder v. Wood, 208 U.S. 226 (1908). The Mining Law is also silent on environmental regulation, but for more than a century state law has been applied in this area as well. The earli-

est decisions involved a controversy of dramatic proportions between the hardrock mining industry and farmers over the practice of hydraulic mining. In a series of cases in state and federal courts in the 1870's and 1880's, hydraulic mining was substantially prohibited through application of the common law principle of nuisance. See generally Kelley, Gold vs. Grain (1959).

Both state and federal courts rejected the argument that Congress had insulated hydraulic mining from state environmental regulation. See, e.g., People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 151-52, 4 P. 1152, 1158-59 (1884); Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753, 772-775 (C.C.A. 1884). Cf. Gold Washing & Water Co. v. Keyes, 96 U.S. 199 (1878). The most respected commentator on the federal Mining Law described the hydraulic mining

cases as establishing the principle that a mining practice creating a nuisance "has neither been authorized by . . . national legislation nor legalized by implication . . .." Lindley, Mines (3d ed., 1914), vol. 3, § 849, p. 2098; see also § 843, pp. 2085-86 (collecting and reviewing cases).

In the modern era, states have continued this tradition of regulating mining operations on federal lands, and state permitting requirements virtually identical to those at issue here have been upheld against preemption challenges. State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976) (Click I); 102 Idaho 443, 631 P.2d 614 (1981) (Click II), cert. denied sub nom. Click v. Idaho, 457 U.S. 1116 (1982); State ex rel. Cox v. Hibbard, 31 Or.App. 269, 570 P.2d 1190 (1977); Mt. Emmons Mining Co. v. Town of Crested Butte, 690 P.2d 231

(Colo. 1984). Although two other decisions held that a flat state prohibition of all activity on federal mining claims was preempted, Elliott v. Oregon International Mining Co., 60 Or.App. 474, 654 P.2d 663 (1982); and Brubaker v. Board of County Commissioners of El Paso County, 652 P.2d 1050 (Colo. 1982); (and see Skaw v. United States, 740 F.2d 932, 940-41, n. 3 (Fed.Cir. 1984)), in other cases (Mt. Emmons, Hibbard) these same courts upheld state authority to use a permit system to regulate such activities to protect the environment.

Finally, for more than a century Congress has consistently failed to act on proposals that it preempt state authority over Mining Law activities. The first Public Land Commission, reporting in 1880, advocated federal preemption but Congress did not respond. See Gates, History of Public Land Law Development,

pp. 422-34, esp. at 429. The Public Land Law Review Commission, reporting in 1970, recommended federal preemption of certain state laws regulating Mining Law activities, see One Third of the Nation's Land, pp. 129-30 (1970), but once again Congress balked. Instead, in requiring federal recordation of all mining claims for the first time in 1976, see United States v. Locke, 471 U.S. ___, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985), Congress was careful not to waive any requirements of applicable law, including state recordation and assessment work statutes. See 43 U.S.C. § 1744(d); S. Rep. No. 583, 94th Cong., 1st Sess. 65 (1975); 43 C.F.R. § 3833.0-1(d) (1984).

Once again the Ninth Circuit decision turned its back on these teachings, curtly dismissing them as "unpersuasive," 768 F.2d at 1083, in astonishing disregard of the rich history of state in-

volvement in regulating activities conducted under the Mining Law. In particular, to view, as did the court below, state power to regulate private activities on federal lands as analogous to state power to regulate practices of the United States Patent Office is strikingly myopic. See 768 F.2d at 1082, discussing Sperry v. Florida, 373 U.S. 379 (1963).

The court below also relied on two decisions where state permitting requirements have been found preempted in special circumstances. The first was this Court's decision in First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946), construing the Federal Power Act, 16 U.S.C. §§ 791a-82r. First Iowa emphasized the statute's "comprehensive" federal planning responsibility for such power projects, a responsibility that it held did not admit a state veto. The Power Act

and the Mining Law could not be more different on this score, for the latter calls for no federal planning at all.[2/] Rather, it simply throws open federal lands to the location and development of mining claims, and makes them subject to both federal and state regulation. Cf. Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 223, n. 34 (1983). Further, the reach of First Iowa has been sharply confined in the public lands context by subsequent decisions like California v. United States, 438 U.S. 645 (1978).

The other decision relied on heavi-

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2. The modern statute that establishes a comprehensive planning system for national forest lands, 16 U.S.C. § 1604, adopted in 1974, requires those plans to be "coordinated with the land and resource management planning processes of State . . . governments." See also 36 C.F.R. § 219.7 (1985).

ly by the court below was Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), aff'd mem., 445 U.S. 947 (1980). But Ventura involved significantly different facts (county regulation under a zoning ordinance of a federal lessee under the Mineral Leasing Act), and significantly different legal arguments (the county's principal argument being that Congress had no constitutional authority to oust state control--an argument directly at odds with this Court's decision in Kleppe v. New Mexico, 426 U.S. 529 (1976)). Most important, apart from whatever significance this Court's summary affirmance of Ventura might otherwise have, Ventura has been sharply limited, if not implicitly overruled, by this Court's subsequent decisions. Particularly, Commonwealth Edison v. Montana, 453 U.S. 609 (1981), reached a substantially opposite result construing the

same statutory language, without referring to Ventura at all. Other courts recently facing issues similar to Ventura have ignored or limited it on the grounds discussed above. See, e.g., Gulf Oil Corp. v. Wyoming Oil and Gas Conservation Commission, 693 P.2d 227, 236-38 (Wyo. 1985); Hibbard, supra, 570 P.2d at 1195, Crested Butte, supra, 690 P.2d 231, 241-42; Click II, supra, 631 P.2d 614, 617-8.

The court below also placed heavy reliance on the so-called "promotion of mining" purpose of the Mining Law. See 768 F.2d at 1081. It paid lip service to this Court's recent holdings that a "general federal purpose to encourage a particular activity does not automatically preempt state environmental regulation that incidentally discourages that activity." Id. Nevertheless, it went on to find state regulation "preempted simply because it would undermine the federal

permit authority." 768 F.2d at 1082.

This reasoning was flatly rejected by this Court in Commonwealth Edison, a case decided under the Mineral Leasing Act, which not incidentally contains "promotion of mining" language almost identical to that found in the Mining Law.[1/] In Commonwealth Edison this Court held that even if the state taxation undermined the federal policy of capturing all the economic rents attributable to mining coal on federal lands, preemption still did not exist. See 453 U.S. at 631-33.

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3. Compare 17 Stat. 91 (Mining Law of 1872, entitled "An Act to Promote the Development of the Mining Resources of the United States") with 41 Stat. 437 (Mineral Leasing Act of 1920, entitled "An Act to Promote the Mining of Coal, Phosphate, Oil, Oil Shale, Gas and Sodium on the Public Domain."

II. THE NINTH CIRCUIT DECISION IGNORES THE PRESERVATION OF STATE AUTHORITY REFLECTED IN THE STATUTES AND REGULATIONS APPLICABLE TO NATIONAL FORESTS

The Court of Appeals also found that the Forest Service's creation of a regulatory system in 1974, designed to mitigate some of the environmental effects of activities conducted under the Mining Law on national forest lands, in effect operated to preempt state authority to apply their own permit systems. See 768 F.2d at 1081, 1083; 36 C.F.R. § 228.

Although Congress has sometimes explicitly delegated power to administrative agencies to make the sensitive balancing judgments involved in deciding whether to preempt otherwise applicable state law, see, e.g., Ray v. Atlantic Richfield Co., 435 U.S. 151, 177-78 (1978), Congress has not done so either in the Mining Law or the National Forest

Organic Act. In the same 1897 statute where Congress confirmed federal authority to adopt environmental regulations applicable to Mining Law activities on the national forests, see 16 U.S.C. § 478, it preserved and carried forward state jurisdiction over activities on those forests. See 16 U.S.C. § 480 (disclaiming any limitation on state jurisdiction). See also 16 U.S.C. § 551(a), adopted in 1971. This Court has applied these statutes accordingly, to preserve state legislative jurisdiction over activities carried out within the national forests. See Wilson v. Cook, 327 U.S. 474, 486-87 (1945); United States v. County of Fresno, 429 U.S. 452, 455 (1977). The Court of Appeals here substantially ignored those statutes and cases.

Even assuming, arguendo, that Congress has given the Forest Service au-

thority to preempt state permit requirements by regulation, this Court has counseled that, because federal agencies "can speak through a variety of means . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." Hillsborough County v. Automated Medical Laboratories, ___ U.S. ___, 105 S.Ct. 2371, 2377 (1985). The record here is bereft of any such intent--the regulations themselves and the agency's actual practice under them are decidedly to the contrary.

The regulations explicitly refer to the applicability of state laws, without distinguishing betweeen those laws that are implemented by permits and those that are not. See, e.g., 36 C.F.R. §§ 228.8(a), (b), (c) and (h); 228.9; 228.11 (1985). Most notably, 36 C.F.R. § 228.8(h) provides that "[c]ertification or other approval by state agencies . . .

of compliance with laws and regulations relating to mining operations will be accepted as compliance with similar or parallel requirements of these regulations."[4]

The agency's intent could not be more clear: It not only acknowledges the propriety of state regulation by permit ("certification or other approval"), but actually defers to it, at least to the extent it is "similar or parallel" to federal requirements. Indeed, the Forest Service has entered into formal coopera-

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4. The environmental impact statement (EIS) prepared by the Forest Service on these regulations is particularly revealing. It recounted that state agencies had expressed "concern" about possible "overlap and duplication of the proposed regulations with existing State law," and flatly stated that the duplication was "recognized and provided for" in the regulations, citing what is now 36 C.F.R. § 228.8(h). Final EIS No. 74-3204F, Proposed Mining Regulations (U.S. Forest Service, July 12, 1974), pp. 21-22.

tive agreements with state regulatory agencies to carry out this partnership. See Appendices I-O to the Jurisdictional Statement of the California Coastal Commission; see also 43 C.F.R. §§ 3809.1-4 (1984) (BLM counterpart regulations acknowledging state regulatory authority). It is also significant that, unlike the mining claimant here, most of the hard-rock mining industry has generally sought to accommodate itself to state regulation. See, e.g., Friends of the Earth v. Butz, 406 F.Supp. 742, 747 (D.Mont. 1975), appeal dismissed as moot, 576 F.2d 1377 (9th Cir. 1978); Watson and Danielson, "Environmental Mediation," 15 Nat. Resources Lawyer 687, 692, n. 11 (1983); Kimball, "Impact of BLM Surface Management Regulations on Exploration and Mining Operations," 28 Rocky Mt. Min.L.Inst. 509, 562-65 (1983).

The Ninth Circuit discounted the

relevance of a Forest Service announcement that Granite Rock was responsible for complying with state law by noting that a "routine staff statement cannot change the effect of formally adopted regulations." 768 F.2d at 1083. But its view of these regulations was in profound disregard of their language, spirit and implementation, as well as the statutory authority under which they were adopted--each of which negates the conclusion that the state permit requirement has been preempted.

III. THE NINTH CIRCUIT DECISION RUNS COUNTER TO THIS COURT'S TEACHINGS IN THE PREEMPTION AREA, AND CASTS DOUBT ON A HOST OF STATE LAWS ROUTINELY APPLIED TO ACTIVITIES ON FEDERAL LANDS

In recent years this Court has emphasized that facial challenges to regulatory power, such as Granite Rock is making here by denying any state permit-

ting authority over its operations, must be measured facially, and cannot be controlled by speculations about how that power might, in the end, actually be exercised. See, e.g., Agins v. City of Tiburon, 447 U.S. 255, 260 1980). Indeed, this Court has recently cautioned that state and local authorities must be given full opportunity to pass on objections to their exercise of regulatory power, in their own administrative processes, before issues of federal law growing out of those regulatory systems are ripe for federal court review. Williamson County Regional Planning Commission v. Hamilton Bank, ___ U.S. ___, 105 S.Ct. 3108, 3117-19 (1985). But here, the Ninth Circuit has inexplicably inferred preemption of the state permit requirement on the flimsiest of grounds, thus in effect "seeking out conflicts between state and federal regulation where none clearly exist," in

violation of this Court's instructions. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 130 (1978), quoting Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 446 (1960).

A proper regard for our federal system requires that California be given the opportunity to demonstrate, by actual implementation of its permit authority, that no real conflict exists with federal law. The tradition of state-federal partnership in the management of federal lands is strong and enduring, a not insignificant by-product of the westward expansion of the United States and the retention by the federal government of vast tracts of land in federal ownership. That tradition should not be lightly cast aside. Departures from it should require a rather compelling showing that Congress has actually decided, in a specific context, that the partnership is not appro-

priate.

States clearly have a legitimate interest in what happens on federal lands within their borders--in this case, within a few feet of state and private lands subject to the full range of state regulatory powers. For well over a century, Congress has shown no interest in disturbing state regulatory authority under the Mining Law. That reluctance to interfere has not changed as the regulatory interest of the states, along with that of the society at large, has become more concerned with environmental protection.

Moreover, there is every reason to believe that the states take their responsibility seriously and do not exercise their authority arbitrarily. States derive significant benefits from activities conducted on federal land--not the least of which are employment opportunities for their citizens and other econom-

ic benefits provided by activities such as mining. Thus, there is no reasonable basis for assuming that states will inevitably be hostile to mineral development or to the national interest. Congress has not so assumed, and neither has this Court.

A genius of our federal system is the structural basis it establishes for measured compromise between national and local interests. The federal land management statutes, like the Mining Law and the National Forest Organic Act, are replete with such compromises, giving the states a meaningful role in regulating private activities on federal lands. Moreover, by sharing regulatory power among jurisdictions, cooperative federalism provides a welcome buffer against the destabilizing effects of abrupt shifts in the policies of successive national and state administrations on questions as

sensitive as federal land management.

The decision below wreaks havoc with these carefully crafted compromises. The Ninth Circuit here would shut the state almost entirely out of the regulatory process simply because of the speculative fear that, in some cases, a state might act contrary to the national interest. Yet acknowledging a meaningful participatory role for the state does not require tolerating a state's abuse of its power. On the contrary, recognizing State Coastal Commission jurisdiction does not compromise in any way the ability of the federal courts to review the actual exercise of this regulatory authority.

Moreover, state abuse of its authority could easily invite Congress to readdress the preemption question. That body has a readily available and potent remedy in its near-plenary property

clause power, Art. IV § 3, coupled with the supremacy clause, Art. VI, to alter the balance between state and federal interests it has previously struck. As this Court recently observed:

> Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective. The Courts should not assume the role which our system assigns to Congress.

Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 223 (1983) (footnote omitted).

In short, there are numerous checks operating to prevent abuse of state regulatory authority here. Ironically, by foreclosing direct state regulation in an attempt to "keep the applicable environmental requirements within the range of reasonableness," 768 F.2d at 1083, the Ninth Circuit here complicates life for

both the federal agencies and the mining claimant. Its decision provides confusing instructions to district rangers implementing the Forest Service regulations in the field, and leaves them in an exceedingly awkward position. On the one hand, according to the court, a state "may urge the Forest Service to withhold or revoke a federal mining permit from a miner who does not abide by all applicable state and federal standards." Four sentences later, however, it suggests that "[c]urrent federal law allows the states to establish environmental standards that the Forest Service will apply in exercising its permit authority." 768 F.2d at 1083 (emphasis added).

Out of this muddle can only come uncertainty and the prospect of years of debilitating friction and litigation to clarify matters. If the permitting authority of the Coastal Commission is pre-

empted, for example, may the Commission require the claimant to post a bond adequate to cover the cost of reclamation according to state standards? The confusion is compounded by the fact that the Bureau of Land Management, the other federal agency with significant responsibility for administering the Mining Law, has likewise plainly recognized state authority to apply their permit systems to hardrock mining on the BLM-managed lands. See 43 C.F.R. § 3809.3-1 (1984); 45 Fed. Reg. 78908 (1980).

Moreover, the approach of the Ninth Circuit, to presume preemption of state permit requirements any time the federal agency has begun regulating in the general area, poses serious problems to federal land managers in a wide variety of contexts. Will state and local building codes, sanitation, health, safety and other civil and criminal laws remain ap-

plicable to Mining Law operations and other private activities conducted on federal lands? Are the permit requirements of other state environmental laws, dealing with such subjects as air and water quality and toxic waste disposal, no longer applicable to operations on mining claims on federal land? At the least, the court below seems to have held that the state cannot directly enforce any of these provisions by means of a permit requirement, but must instead rely on the good will and bureaucratic energy of the federal land management agencies to carry out state policies and enforce state requirements.

Clearly this is an area where a relatively bright-line test is desirable. Historically, this Court has taken the position that states may exercise jurisdiction over private activities on federal land unless and until Congresss acts

to displace them. See, e.g., Omaechevarria v. Idaho, 246 U.S. 343, 346 (1918) (Brandeis, J.). More recently, this Court has brightened the line somewhat in the closely related context of water resource management; namely, that state laws, including permit requirements, are fully applicable even to activities undertaken directly by the federal government unless Congress has spoken firmly to the contrary. California v. United States, 438 U.S. 645, 678 (1978).

The history of state power over mining is not substantially different from that over water; indeed, as noted earlier, the tradition of federal deference springs from the same statutory source--the Mining Law. The Ninth Circuit decision is an abrupt, radical departure that disregards this parallel, ignores precedent, and is wholly insensitive to history, tradition, and the vital

interests of the states in protecting the environment within their borders. This appeal gives this Court the opportunity to confirm the contemporary, and the traditional, practice that private activities under the Mining Law, and indeed private activities on public lands generally, are subject to state regulatory authority until Congress plainly says otherwise.

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AMICUS CURIAE

BRIEF

NO. 85-1200

(4)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October, 1985

CALIFORNIA COASTAL COMMISSION, *et al.*,

Appellants,

v.

GRANITE ROCK COMPANY,

Appellee.

On Appeal from the United States Court of Appeals, for the Ninth Circuit

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[redacted]

AND BRIEF *AMICUS CURIAE* OF THE AMERICAN MINING CONGRESS IN SUPPORT OF APPELLEE

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN MINING CONGRESS IN SUPPORT OF APPELLEE

The American Mining Congress, a non-profit corporation of the State of Colorado, acting in its capacity as a trade association composed of (1) producers of most of America's metals, coal and industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment and supplies; and (3) engineering and consulting firms and financial institutions that serve the mining industry, moves the Court for leave to file the accompanying brief as *amicus curiae* in support of appellee Granite Rock Company to affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

The Appellants, California Coastal Commission, *et al.*, and the Appellee, Granite Rock Company, through their respective counsel of record have consented to the filing of this Motion and Brief in Support of Appellee.

The 3-0 decision of the Ninth Circuit Court of Appeals is correct and should be allowed to stand.

First, the Judgment is buttressed by decisions of the Supreme Court and further argument is unnecessary. Second, there is no conflict between circuits. Third, the statutes and regulations are clear and are being properly implemented.

The national policy for development of minerals on public lands established by the Congress in 1872 and reaffirmed in subsequent legislative acts has been correctly and decisively applied by the Ninth Circuit Court of Appeals. In view of the widespread ramifications for the mining industry if a decision to the contrary were adopted, the American Mining Congress respectfully moves the court to grant it permission to file the attached brief as an *amicus curiae* in support of Appellee.

Respectfully Submitted,

MARY JANE C. DUE
Counsel of Record
Attorney for the
American Mining Congress

QUESTIONS PRESENTED

(1) Whether Congress has exercised its power to regulate mining activity on federally owned lands within the coastal zone and thereby preempted the State of California's inherent police power over such activity.

(2) Whether the State of California permit mechanisms intrude into the sphere of federal permit authority.

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S. Rept. No. 93-686, 93rd Cong., 2d Sess. Reprinted in 1974 U.S. Code & Ad. News 4060 7

IN THE

Supreme Court of the United States

October, 1985

No. 85-1200

CALIFORNIA COASTAL COMMISSION, *et al.*,

Appellants,

v.

GRANITE ROCK COMPANY,

Appellee.

On Appeal from the United States Court of Appeals, for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN MINING CONGRESS IN SUPPORT OF APPELLEE

STATEMENT OF INTEREST

Pursuant to Rule 36.1, the American Mining Congress files this brief as *amicus curiae* in support of appellees in No. 85-1200.

Its statement of interest is set forth in the accompanying motion.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California is reported at 590 F. Supp. 1361 (N.D. Cal. 1984). The opinion of the Ninth Circuit Court of Appeals is reported at 768 F. 2d 1077 (1985).

JURISDICTION

The district court refused to enjoin the California Coastal Commission from requiring Granite Rock to obtain a state permit in order to continue mining on federally owned forest land. The Ninth Circuit exercised its jurisdiction under 28 U.S.C. § 1291 and reversed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The Supremacy Clause of the Constitution, Art. VI, cl.2, provides in pertinent part that:

> . . . the Laws of the United States, . . . shall be the supreme Law of the Land.

2. The Property Clause of the Constitution, Art. IV, Sec. 2, cl.2 provides in pertinent part that:

> . . . Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . .

3. The 1872 Mining Act is reported at Appendix E, to the Jurisdictional Statement.

4. Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (1982) is reprinted in Appendix A to this Brief.

5. The National Materials and Minerals Policy, Research and Development Act of 1980, 30 U.S.C. § § 1601-1605 (1982), is reprinted in pertinent part in Appendix A to this Brief.

6. The National Critical Materials Act of 1984, (98 Stat. 1249), 30 U.S.C.A. § § 1801-1811 (1985-Supp.), is reprinted in pertinent part in Appendix A to this Brief.

7. The Forest Service Organic Act, 16 U.S.C. § 478 (1982), provides in pertinent part:

> Nor shall anything herein prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: Provided, that such persons comply with the rules and regulations covering such national forests.

8. The Forest and Rangeland Renewable Resources Planning Act, 16 U.S.C. § § 1600-1614, provides in pertinent part at § 1604(a):

> As part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

9. The Forest Service Regulations 36 C.F.R. § § 228.1-228.5 are reprinted in Appendix F, Jurisdictional Statement.

10. The Forest Service Regulations 36 C.F.R. § § 219.7 and 219.22 are reprinted in Appendix A to this Brief.

STATEMENT OF THE CASE

The American Mining Congress, *Amicus Curiae*, rather than duplicating printed matter before the Court adopts by way of reference the Statement of the Case set forth in Motion and Brief of the Appellee Granite Rock Company.

REASONS FOR AFFIRMING JUDGMENT

The Decision of the Ninth Circuit is correct and should be affirmed.

(1) Forest Service regulations mandate that the power to control surface activity related to mining in national forests and to require mining operators to comply with applicable environmental requirements lies exclusively with the Forest Service.

(2) While the Forest Service regulations do not go so far as to occupy the field of establishing environmental standards

and recognize that the Forest Service may cooperate and coordinate with a state's environmental regulations in addition to those established by federal agencies, an independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority and is preempted.

(3) The statutes and regulations governing the mining on federal public domain are being properly implemented.

(4) There is no conflict between circuits.

(5) The doctrine of *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*[1] is dispositive of the matter.

I. The Pervasive Legislative and Regulatory Federal Scheme of Administering Mining Law Activities on National Forest Lands Precludes Enforcement of Local Law on Those Activities

Article IV, Section 3, Clause 2 of the Constitution of the United States provides, among other things, that ". . . Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . ."

This Court has said that in the exercise of its legislative power "Congress may prescribe rules respecting the use of the public lands. It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned." *McKelvey* v. *United States*, 260 U.S. 353, 359 (1922).

A. The 1872 General Mining Law

The Congress, exercising its authority under the Constitution, determined that all valuable mineral deposits belonging

[1] *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152 (1946).

to the United States are free and open to exploration and purchase according to the local customs or rules of miners in the several mining districts "so far as the same are applicable and not inconsistent with the laws of the United States."[2]

The 1872 general mining law was an invitation from the Congress to miners to go upon the public lands to find, develop and mine minerals in the national interest, and operates as a floating grant which attaches upon the locator's compliance with its provisions. The responsibility for managing the mineral resources is in the Secretary of Interior.

The only way that the rights of a mineral locator under the 1872 scheme of the Congress to acquire and develop rights in the public lands for mining can be extinguished is by withdrawing the lands from operation of the floating grant. *See* 43 U.S.C. §1712(e) (3). The Secretary of the Interior exercises this withdrawal authority, but the Secretary of Agriculture, or his delegate, can request that this be done in a given circumstance. *See* 36 C.F.R. 219.22 requiring assessment of the need to withdraw areas from mineral development. No such action has been taken on the lands in question.

Therefore, Appellants' statement (Jurisdiction Statement p. 18) that "Thus, the notion that the Forest Service must delicately balance competing federal mining promotion and resources protection objectives is wholly unfounded[ ]" is clearly in error in view of section 219.22.

The national policy expressed by the mining law of the overriding importance of mining has been reaffirmed by the Mining and Minerals Policy Act of 1970,[3] the National Materials and Minerals Policy, Research and Development Act of 1980[4] and the National Critical Materials Act of 1984.[5]

[2] Act of May 10, 1872, 30 U.S.C. §22 (1982).

[3] Mining and Minerals Policy Act of 1970, 30 U.S.C. §21a (1982).

[4] National Materials and Minerals Policy, Research and Development Act of 1980, 30 U.S.C. §§1601-1605 (1982).

[5] National Critical Materials Act of 1984, 30 U.S.C.A. §1801(a) (1985, Supp.).

The Federal Land Policy and Management Act of 1976[6] governing the management of the public lands, requires that the public lands be managed in a manner that "recognizes the Nation's need for domestic sources of minerals" including "implementation of the Mining and Minerals Policy Act of 1970." (§ 1701(a)(12)). The Department of Interior has issued comprehensive regulations applicable to mining on public lands. *See* 43 C.F.R. Part 3800.

B. The Forest Service Organic Act

The U.S. mining laws apply to all mineral deposits in national forest lands. The Forest Service Organic Act of 1897 provides that nothing in the Act prohibits any person from entering upon such national forests for all proper purposes, including prospecting, locating and developing the mineral resources, *provided* that such persons comply with the rules and regulations covering such national forests.

C. The Multiple Use Mining Act of 1955[7]

In 1955 Congress clarified the responsibility of Federal land management agencies to protect the surface resources of lands under their jurisdiction.

The 1955 Act provides that rights under any mining claim located after 1955 are subject, prior to patent, to the right of the United States to manage and dispose of the vegetative surface resources and to manage other surface resources, except mineral deposits subject to location under the mining laws of the United States. The Act specifically provides that "... any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to en-

[6] Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701-1782 (1982).

[7] Multiple Use Mining Act of 1955, 30 U.S.C. §§601-615 (1982).

danger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: . . ."[8]

D. The Forest and Rangeland Renewable Resources Planning Act

In 1974, the Congress enacted the Forest and Rangeland Renewable Resources Planning Act[9] requiring an assessment of the Nation's renewable resources and development and preparation of a national program for renewable resources to be periodically reviewed and updated.

The Secretary of Agriculture by virtue of his statutory authority for management of the National Forest System and as a part of the renewable resource program must develop and maintain land and resource management plans ". . . coordinated with the land and resource management planning processes of State and local governments and other Federal agencies."[10]

The legislative history of that Act makes it clear that "[T]he conservation of the environment is, therefore, declared to be essential for the achievement of an ecologically healthy and economically functioning resource base."[11]

The legislative history referred to above directs representatives of the Forest Service to manage the lands but coordinate with state and private owners. For example: "The directives in this legislation go to the Forest Service. The lands managed by the States and local governments, as well as by private individuals and other Federal agencies are

[8] *Id.* at 30 U.S.C. §612(b).

[9] Forest and Rangeland Renewable Resources Planning Act, 16 U.S.C. §§1600-1614 (1982).

[10] *Id.* at 16 U.S.C. 1604(a).

[11] S. Rep. No. 93-686, 93rd Cong., 2d Sess. Reprinted in 1974 U.S. Code Cong. & Ad. News, 4060, 4067.

governed by whatever authorities currently exist for them,"[12] and further:

> However, National Forest System plans are to be coordinated with the land use planning processes of state, local and other Federal agencies to the extent that they have such plans. This will prevent overlap and wasteful duplication. It will give the states a greater opportunity to be aware of the land use planning process within the National Forest System, and it will insure more effective coordination with this planning. Land use planning within the National Forest System is already authorized, and is being carried out under the provisions of the Multiple-Use Sustained-Yield Act of 1960. It is desirable that plans on the lands within the System give major consideration to their impact on plans developed by state or local governments. For example: the Forest Service road network has impacts on the State and local roads systems.[13]

E. The Regulatory Scheme

It is the purpose of the Forest Service regulations to set forth rules and procedures for use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws as they affect *surface resources* on all lands under the jurisdiction of the Secretary of Agriculture. It is not the purpose of these regulations to provide for the management of *mineral resources*.

The Forest Service regulations adopted in 1974 cover every environmental aspect of controlling mining operations on national forest lands, including air quality, water quality, solid waste, scenic values, fisheries and wildlife habitat, roads and reclamation (36 C.F.R. 228.8).

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[12] *Id.* at 4069.

[13] *Id.* at 4071.

Such regulations must be within the range of reasonableness. *See United States* v. *Weiss*, 642 F.2d 296, 299 (9th Cir. 1981).

As the Ninth Circuit said: "The Forest Service regulations recognize that a state may enact environmental regulations in addition to those established by federal agencies. . . . But an independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority and thus is preempted." (Jurisdictional Statement App. A, p. A-9).

The Ninth Circuit correctly held that the mining law of 1872 coupled with other congressional expressions and the regulations promulgated thereunder exhibit a scheme of exclusive control prescribed by Congress over the federal public domain lands for mining purposes. Neither the State nor any of its agencies has power to interpose its own permit authority on this established federal scheme of control.

II. Forest Service Regulations Contemplate the Application by the Forest Service of State Environmental Standards

In recent years, the Federal Government has developed a pattern of cooperative effort with adjoining land owners in managing its vast holdings within the boundaries of the public land states.

For example, in the Federal Land Policy and Management Act of 1976 governing the public lands of the United States it is provided that "*to the extent consistent with the laws governing the administration of the public lands*" the Secretary of the Interior shall *coordinate* land use planning and management programs with such programs of the states and local governments (emphasis supplied).[14]

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[14] Federal Land Policy and Management Act, 43 U.S.C. §1712(c) (9).

The Secretary of Agriculture is required under FLPMA to condition each right-of-way under his jurisdiction so as to require *compliance* with applicable air and water quality standards established by or pursuant to applicable Federal or state law and ". . . *require compliance* with state standards for public health and safety, environmental protection, and siting, construction, operation and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards; . . ."[15] (Emphasis supplied.)

Part 219.7 of the Forest Service regulations, adopted pursuant to the Forest and Rangeland Renewable Resources Planning Act of 1974 requires *coordination* with land and resource planning efforts of . . . state and local governments; *review* of the planning and land use policies of . . . state and local governments; *meetings* with the designated state official at the beginning of the planning process; and the responsible Forest Service line officer is to seek *input* from . . . state and local governments.

The Forest Service regulations, Part 228, require the miner to comply with state standards for air quality, water quality and waste, safety and fire regulations.

Instead of contemplating that local governments can require permits under their environmental laws, the Forest Service regulations require mining operators to comply with state environmental standards, and that the requirement for such compliance will be applied by the Forest Service and not by local authorities.

Section 228.8(h) provides that the Forest Service *may* accept certificates or other approval issued by state agencies of compliance with laws and regulations relating to mining operations that are similar or parallel to Forest Service regulations.

As Appellants admit (Jurisdictional Statement p. 22) when Congress does intend to occupy the field, state regulation is ousted.

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[15] *Id.* at §1765(a).

The words Congress used in allowing some consideration of state regulatory requirements do not reflect an abdication of power. These words "coordinate," "cooperate," "consistent with," do not constitute authority to establish a separate system, but clearly show Congress maintaining control of its public lands.

There is one situation where the Congress has provided for clear state involvement in mining on federal public domain.

The Federal Surface Mining Control and Reclamation Act[16] authorized a mechanism so that every state having coal surface mining operations has the opportunity to prepare a state program for the regulation of surface mining within its borders.

In this specific instance, the Congress offered the states a program under controlled circumstances to regulate coal surface mining. Failure of the states to adopt regulatory programs that meet the requirements of the Federal Act results in preemption by the Federal government. No comparable program giving the states such authority has ever been established for minerals other than coal.[17]

The Act required an in-depth study by the National Academy of Sciences–National Academy of Engineering of current and developing technology for mining and reclamation for minerals other than coal. The study failed to recommend a comparable program for other minerals leasable under the Mineral Leasing Act of 1920 or for hard rock minerals locatable under the 1872 mining law. Congress has taken no action to adopt a similar program for minerals other than coal.

Congress has made the determination as to when, where and to what extent its control over federal lands will be exercised. *See U.S.* v. *Hatahley*, 220 F.2d 666 (10th Cir. 1955) reversed on other grounds, 351 U.S. 173.

In the case at bar the Congress has established a national policy for mining and a system of environmental protection of the surface resources of the public domain. In the detailed

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[16] Federal Surface Mining Control and Reclamation Act, 30 U.S.C. §§1201-1328 (1982).

[17] *Id.* at §1273.

regulations promulgated thereunder, beginning at the District Ranger level, the Federal system recognizes the need and provides a mechanism for considering the state's environmental standards.

Because of the established national policy for mining, and as provided in the Forest Service regulations, even the Forest Service is limited in the restrictions it can impose in protecting the surface resources and the environment, by the "reasonableness" of the regulatory measure.

III. The Mining Law Recognizes a Role for State and Local Law and Regulation

The case at bar relating to parallel systems of permits is distinguished from sections 22 and 26 of Title 30 U.S.C. that recognize a role for and delegate authority to state and local law and regulations "not inconsistent with the laws of the United States" and "not in conflict with laws of the United States governing their possessory title. . . ."

Section 28 authorizes the miners of each mining district to make regulations not in conflict with the laws of the United States or with the laws of the State or Territory in which the district is situated governing the location, manner of recording, and amount of work necessary to hold possession of a mining claim.

Section 30 recognizes state court jurisdiction in determining adverse claims of third parties in mineral patent applications and determinations of the exclusive right and title to mineral claims, except as to the legal title of the government itself.

The application of state and local law in these limited circumstances and those described in section II hereof governing the state and local planning and environmental regulations do not take away the Congressional control and authority over the main and substantial conditions for mining on the public domain. That authority is in the Secretary of the Interior and the Secretary of Agriculture.

CONCLUSION

The Ninth Circuit relies upon the doctrine of *First Iowa* for the proposition that the establishment of a federal permit system preempts a state law that prohibits such activity unless the petitioner first obtains a state permit.

Appellants, at page 6 of the Jurisdictional Statement, misconstrue the Ninth Circuit decision. The issue of preemption is not drawn when a federal agency issues some form of permit approval for an activity that conflicts with any state permit requirement for the same activity. The issue is drawn by the overlying scheme itself.

Thus, it is the Act of 1872 opening the Federal public domain to mining and establishing a system to discover and acquire valuable mineral deposits that creates the conflict with the state. And, except for the limited powers ceded to the states by the mining law, subsequent statutory measures and the implementing regulations set forth herein, the state permit system, not the mere approval of some activity is preempted.

In *First Iowa* the Court said: "The Act leaves to the states their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress to regulate interstate and foreign commerce, administer the public lands and reservations of the United States. . . ."[18]

The comprehensive planning and execution of national policy for power development, as outlined in *First Iowa* and for mining development, as in the case at bar, depend upon the judgment of representatives of the United States not of the states.

To subordinate the national interest in the development of minerals to the control of the state would defeat the national purpose and create the conflict between state and federal governments.

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[18] *First Iowa*, 328 U.S. 171.

As the Court said in *First Iowa* the system there adopted "...resulted in a dual system involving the close integration of powers rather than a dual system of futile duplication of two authorities over the same subject matter."[19]

In the case before the Court, the federal statutes and regulations are indicative of the integration of the state environmental regulations into the Federal permit system rather than the duplication of federal and state jurisdiction.[20]

The Ninth Circuit relied upon *First Iowa* in reaching its decision in *Ventura County* v. *Gulf Oil Corporation*[21] and held that the Mineral Lands Leasing Act of 1920 preempted a county zoning ordinance that prohibited exploration and extraction activities on federal land unless a county permit was first obtained.

In *First Iowa*, *Ventura* and the case at bar, the local law permit systems conflict with Federal law and are an obstacle to the Congressional intent.

While the system for acquiring a property right in locatable minerals under the 1872 mining law and the system established for rights to leaseable minerals under the 1920 Mineral Lands Leasing Act differ (in the first instance, the scheme established envisions property rights ultimately shifting from the United States to the locator; and in the second instance the lessee has a right to the mineral only for so long as it can be recovered in commercial quantities, but the title to the land itself is retained by the United States as lessor), both provide a comprehensive planning responsibility system that preempts any intrusion by a state or local entity into the sphere of federal permit authority.

It is common practice under the mining law for mining to proceed for many years on an unpatented, valid mining claim.

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[19] *Id.* at 171.

[20] *Id.* at 176.

[21] *Ventura County* v. *Gulf Oil Corporation*, 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.* 445 U.S. 947 (1980).

The right established by such a claim is a unique property right, good against all the world, with a valuable residuary and reversionary right in the Federal government prior to patent to protect that reversionary interest including surface management. The Federal government, under both the leasing system and the 1872 mining law retains a right in its property and in the development of minerals in the national interest.

Here, as in *Ventura*, appellants seek to regulate conduct which Congress has authorized. This it cannot do.

This case is consistent with *Ventura*, correctly follows the *First Iowa* doctrine and should be allowed to stand.

Respectfully submitted,

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March 3, 1986

APPENDIX TO

BRIEF *AMICUS CURIAE*

AMERICAN MINING CONGRESS

Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (1982)

§ 21a. National mining and minerals policy; definition of minerals; execution of policy under other authorized programs; report to Congress

The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.

For the purpose of this section "minerals" shall include all minerals and mineral fuels including oil, gas, coal, oil shale and uranium.

It shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority under such programs as may be authorized by law other than this section. For this purpose the Secretary of the Interior shall include in his annual report to the Congress a report on the state of the domestic mining, minerals, and mineral reclamation industries, including a statement of the trend in utilization and depletion of these resources, together with such recommendations for legislative programs as may be necessary to implement the policy of this section.

National Materials and Minerals Policy, Research and Development Act of 1980, 30 U.S.C. § 1601, 1602 (1982)

§ 1601. Congressional statement of findings; definition

(a) The Congress finds that—

(1) the availability of materials is essential for national security, economic well-being, and industrial production;

(2) the availability of materials is affected by the stability of foreign sources of essential industrial materials, instability of materials markets, international competition and demand for materials, the need for energy and materials conservation, and the enhancement of environmental quality;

(3) extraction, production, processing, use, recycling, and disposal of materials are closely linked with national concerns for energy and the environment;

(4) the United States is strongly interdependent with other nations through international trade in materials and other products;

(5) technological innovation and research and development are important factors which contribute to the availability and use of materials;

(6) the United States lacks a coherent national materials policy and a coordinated program to assure the availability of materials critical for national economic well-being, national defense, and industrial production, including interstate commerce and foreign trade; and

(7) notwithstanding the enactment of section 21a of this title, the United States does not have a coherent national materials and minerals policy.

(b) As used in this chapter, the term "materials" means substances, including minerals, of current or potential use that will be needed to supply the industrial, military, and essential civilian needs of the United States in the production of goods or services, including those which are primarily imported or for which there is a prospect of shortages or uncertain supply, or which present opportunities in terms of new physical properties, use, recycling, disposal or substitution, with the exclusion of food and of energy fuels used as such.

§ 1602. Congressional declaration of policies

The Congress declares that it is the continuing policy of the United States to promote an adequate and stable supply of materials necessary to maintain national security, economic well-being and industrial production with appropriate attention to a long-term balance between resource production, energy use, a healthy environment, natural resources conservation, and social needs. The Congress further declares that implementation of this policy requires that the President shall, through the Executive Office of the President, coordinate the responsible departments and agencies to, among other measures—

(1) identify materials needs and assist in the pursuit of measures that would assure the availability of materials critical to commerce, the economy, and national security;

(2) establish a mechanism for the coordination and evaluation of Federal materials programs, including those involving research and development so as to complement related efforts by the private sector as well as other domestic and international agencies and organizations;

(3) establish a long-range assessment capability concerning materials demands, supply and needs, and provide for the policies and programs necessary to meet those needs;

(4) promote a vigorous, comprehensive, and coordinated program of materials research and development consistent with the policies and priorities set forth in the National Science and Technology Policy, Organization, and Priorities Act of 1976 (42 U.S.C. 6601 *et seq.*);

(5) promote cooperative research and development programs with other nations for the equitable and frugal use of materials and energy;

(6) promote and encourage private enterprise in the development of economically sound and stable domestic materials industries; and

(7) encourage Federal agencies to facilitate availability and development of domestic resources to meet critical materials needs.

National Critical Materials Act of 1984, 30 U.S.C.A. § 1801(a)

§ 1801. Congressional findings and declaration of purposes

(a) The Congress finds that—

(1) the availability of adequate supplies of strategic and critical industrial minerals and materials continues to be essential for national security, economic well-being, and industrial production;

(2) the United States is increasingly dependent on foreign sources of materials and vulnerable to supply interruption in the case of many of those minerals and materials essential to the Nation's defense and economic well-being.

(3) together with increasing import dependence, the Nation's industrial base, including the capacity to process minerals and materials, is deteriorating—both in terms of facilities and in terms of a trained labor force;

(4) research, development, and technological innovation, especially related to improved materials and new processing technologies, are important factors which affect our long-term capability for economic competitiveness, as well as for adjustment to interruptions in supply of critical minerals and materials;

(5) while other nations have developed and implemented specific long-term research and technology programs to develop high-performance materials, no such policy and program evolution has occurred in the United States;

(6) establishing critical materials reserves, by both the public and private sectors and with proper organization and management, represents one means of responding to the genuine risks to our economy and national defense from dependency on foreign sources;

(7) there exists no single Federal entity with the authority and responsibility for establishing critical materials policy and for coordinating and implementing that policy; and

(8) the importance of materials to national goals requires an organizational means for establishing responsibilities for materials programs and for the coordination, within and at a suitably high level of the Executive Office of the President, with other existing policies within the Federal Government.

FOREST SERVICE REGULATIONS, 36 CFR Ch. II (7-1-85 Edition), 36 C.F.R. 219.7, 219.22

§ 219.7 Coordination with other public planning efforts.

(a) The responsible line officer shall coordinate regional and forest planning with the equivalent and related planning efforts of other Federal agencies, State and local governments, and Indian tribes.

(b) The responsible line officer shall give notice of the preparation of a land and resource management plan, along with a general schedule of anticipated planning actions, to the official or agency so designated by the affected State (including the Commonwealth of Puerto Rico). The same notice shall be mailed to all Tribal or Alaska Native leaders whose tribal lands or treaty rights are expected to be impacted and to the heads of units of government for the counties involved. These notices shall be issued simultaneously with the publication of the notice of intent to prepare an environmental impact statement required by NEPA procedures (40 CFR 1501.7).

(c) The responsible line officer shall review the planning and land use policies of other Federal agencies, State and local governments, and Indian tribes. The results of this review shall be displayed in the environmental impact statement for the plan (40 CFR 1502.16(c), 1506.2). The review shall include—

(1) Consideration of the objectives of other Federal, State and local governments, and Indians tribes, as expressed in their plans and policies;

(2) An assessment of the interrelated impacts of these plans and policies;

(3) A determination of how each Forest Service plan should deal with the impacts identified; and,

(4) Where conflicts with Forest Service planning are identified, consideration of alternatives for their resolution.

(d) In developing land and resource management plans, the responsible line officer shall meet with the designated State official (or designee) and representatives of other Federal agencies, local governments, and Indian tribal governments at the beginning of the planning process to develop procedures for coordination. As a minimum, such conferences shall also be held after public issues and management concerns have been identified and prior to recommending the preferred alternative. Such conferences may be held in conjunction with other public participation activities, if the opportunity for government officials to participate in the planning process is not thereby reduced.

(e) In developing the forest plan, the responsible line officer shall seek input from other Federal, State and local governments, and universities to help resolve management concerns in the planning process and to identify areas where additional research is needed. This input should be included in the discussion of the research needs of the designated forest planning area.

(f) A program of monitoring and evaluation shall be conducted that includes consideration of the effects of National Forest management on land, resources, and communities adjacent to or near the National Forest being planned and the effects upon National Forest management of activities on nearby lands managed by other Federal or other government agencies or under the jurisdiction of local governments.

[47 Fed. Reg. 43037, Sept. 30, 1982, as amended at 48 Fed. Reg. 29122, June 24, 1983]

36 C.F.R. 219.22

§ 219.22 Mineral resource.

Mineral exploration and development in the planning area shall be considered in the management of renewable resources. The following shall be recognized to the extent practicable in forest planning:

(a) Active mines within the area of land covered by the forest plan;

(b) Outstanding or reserved mineral rights;

(c) The probable occurrence of various minerals, including locatable, leasable, and common variety;

(d) The potential for future mineral development and potential need for withdrawal of areas from development;

(e) Access requirements for mineral exploration and development; and

(f) The probable effect of renewable resource prescriptions and management direction on mineral resource and activities, including exploration and development.

AMICUS CURIAE

BRIEF

No. 85-1200

Supreme Court, U.S.
FILED
MAR 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

CALIFORNIA COASTAL COMMISSION, et al.,
Appellants,

v.

GRANITE ROCK COMPANY, a corporation,
Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF ALASKA MINERS ASSOCIATION, MINERS ADVOCACY COUNCIL, AND PLACER MINERS ASSOCIATION IN SUPPORT OF APPELLEE'S MOTION TO DISMISS APPEAL, OR AFFIRM JUDGMENT BELOW

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No. 85-1200

In The
Supreme Court of the United States
October Term, 1985

CALIFORNIA COASTAL COMMISSION, et al.,
Appellants,
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GRANITE ROCK COMPANY, a corporation,
Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF ALASKA MINERS ASSOCIATION, MINERS ADVOCACY COUNCIL, AND PLACER MINERS ASSOCIATION IN SUPPORT OF APPELLEE'S MOTION TO DISMISS APPEAL, OR AFFIRM JUDGMENT BELOW

INTEREST OF AMICI CURIAE

Pursuant to the Rule No. 36 of this Court, this brief of amici curiae, Alaska Miners Association, Miners Advocacy Council, and Placer Miners Association (Miners), is sub-

mitted in support of Granite Rock Company, appellee. The Granite Rock Company and the appellants, California Coastal Commission, have consented to the filing of this amicus brief, as shown by documents lodged with the Clerk of this Court.

Alaska Miners Association is a nonprofit, tax-exempt organization and incorporated under Alaska law. Placer Miners Association and Miners Advocacy Council are nonprofit, tax-exempt associations, organized and existing under Alaska law.

These organizations and their members, some of whom own unpatented mining claims on federal lands inside the Alaska coastal zone, seek to preserve the viability of the Alaska mining industry. They believe that governmental regulation of mineral exploration and development must fulfill statutory mandates without crippling the mining industry.

Amici believe, in accordance with the holding of the Ninth Circuit Court of Appeals in this case, *Granite Rock v. California Coastal Commission,* 768 F.2d 1077 (9th Cir. 1985), that a state has no legal authority to subvert federal approval of mining projects on federal lands. Should this Court embrace appellants' arguments and rule otherwise, congressional intent will be frustrated and the mining industry, particularly small scale mining operators already struggling to stay afloat, will confront yet another debilitating and unnecessary regulatory mire.

Miners believe that the state should remain free to regulate and permit those issues not regulated by the federal government such as access, or those areas the federal

government asks the states to regulate, such as air and water quality, but not areas already covered by federal decision making, such as the decision at stake here to allow mining to proceed. Miners also believe that for federal mining properties within the geographic province of the coastal zone, consistency review pursuant to the Coastal Zone Management Act is the proper role for state regulation, and not independent permitting authority. This is particularly important in Alaska, because the state defines *all* lakes and streams to be within the coastal zone. Miners, due to their public interest perspective, believe that they can provide this Court with a more complete argument regarding the issues at stake in this case such as the impact and propriety of dual federal-state permitting regulation of unpatented federal mining claims in the coastal zone.

———o———

OPINIONS BELOW

The decision of the United States District Court for the Northern District of California is reported in *Granite Rock Co. v. California Coastal Commission,* 590 F. Supp. 1361 (N.D. Cal. 1984), and the Ninth Circuit Court of Appeals' decision which is the subject of this appeal and is reported in *Granite Rock v. California Coastal Commission,* 768 F.2d 1077. Both opinions are reproduced in appellants' appendix to jurisdictional statement.

———o———

STATEMENT OF THE CASE

This case arises from the California Coastal Commission's attempt to impose coastal development permit requirements on mining operations conducted on unpatented mining claims located near the California coast.

In 1981, the Granite Rock Company, a family-owned company incorporated in California, engaged primarily in the business of rock and gravel quarrying, applied to the United States Forest Service for a plan of operations permit for authorization of mining on land located in the Los Padres National Forest. The California Coastal Commission, a state agency charged with regulating California coastal development, was entitled under 16 U.S.C. § 1543 to conduct a Coastal Zone Management Act (CZMA) consistency review process. The coastal commission failed to do so within the statutory time limit, however, thus raising the conclusive presumption of state concurrence. 16 U.S.C. § 1456(c) (3) (A). The Forest Service approved the Granite Rock Company's plan of operations. *See* decision below, reproduced in Appellants' Appendix (Appendix) at A-2. This approval was granted in accordance with all existing environmental laws. In 1984, after lawfully conducting its mining operations undisturbed for three years, the Granite Rock Company was ordered by the coastal commission to apply for a coastal development permit or shut down. Appendix at A-2, and District Court opinion below, Appendix at A-16.

Shortly thereafter, the Granite Rock Company filed suit in District Court for the Northern District of California contesting the extent of jurisdiction of the coastal

commission over its mining operation. *Granite Rock v. California Coastal Commission,* 590 F. Supp. 1361.

Granite Rock argued before the District Court, Northern District of California, that its claims were outside the "coastal zone" subject to coastal commission jurisdiction and that its operations were not subject to certain state permitting authority. Appendix at A-16. The District Court, however, held that federal mining claims were not federal property excluded from the CZMA's "coastal zone," and that the coastal commission was free to regulate the claims as much as it pleased. Appendix at A-17 to A-32. The Ninth Circuit, however, reversed and made it plain that this scenario was contrary to the federal purpose of encouraging mining embodied in the Mining Law of 1872, 30 U.S.C. § 21, *et seq.* Appendix at A-6 to A-10. The regulation of mining operations must be reasonable, the court held, and to impose a second tier of redundant permitting authority is simply not reasonable. Appendix at A-9. The court did not find any particular state statute unconstitutional, but merely that the permit mechanism could not stand in the present regulatory scheme. Appendix at A-9.

However, the court also strongly confirmed the right of a state to set its own environmental standards to mining operations on federal lands, which the Forest Service must apply by virtue of its own regulations. Thus, this decision represents the best and most workable solution for the regulation of mining operations on federal lands. The state can set its own stringent environmental standards which the Forest Service must enforce, but the miner is free to proceed after obtaining the necessary federal

permits without the cloud of another permit requirement which would do nothing for the environment but certainly would discourage investment in resource development.

It should be noted that in the event that the federal government refuses to apply state standards a state would be free to sue the federal agency for failure to comply with its own regulations. Also, it is apparent that for those activities and concerns not specifically covered by a federal decision-making permit process, such as access across state land, a state is still free to require permits in order to protect state resources.

———o———

ARGUMENT

This appeal should be dismissed or, in the alternative, the judgment of the District Court should be affirmed for the following reasons:

1. This Court does not have jurisdiction under 28 U.S.C. § 1254(2) because no state statute has been declared unconstitutional.

2. The judgment below should be affirmed because the Court of Appeals properly found that a second state permitting system cannot be imposed on top of the federal permitting system.

3. The California Coastal Commission lacks jurisdiction to regulate activities on federal mining claims

through any mechanism other than the consistency review process of the CZMA.

I

TITLE 28, UNITED STATES CODE, SECTION 1254(2) DOES NOT CONFER JURISDICTION OVER THIS APPEAL

Title 28, United States Code, Section 1254(2) gives this Court jurisdiction over cases where state statutes or regulations have been declared unconstitutional. This is not the case here because there is no state statute or regulation that grants the coastal commission authority to regulate areas outside the coastal zone by means other than a consistency review process. As demonstrated in Part III. *infra*, unpatented federal mining claims are outside the coastal zone.

The Ninth Circuit did not reach the issue of what the geographic limits of the coastal commission's jurisdiction are, but held that whether or not the mining claims were within the coastal zone, the coastal commission could not impose a duplicative permitting procedure. Since in fact the coastal commission lacks state statutory and regulatory jurisdiction to impose such permitting requirements outside the coastal zone, no state statute or regulation has been held unconstitutional.

II

THE CALIFORNIA COASTAL COMMISSION CANNOT SADDLE APPROVED MINING OPERATIONS CONDUCTED ON FEDERAL LANDS WITH A DUPLICATIVE PERMIT SYSTEM WHICH SUPPLANTS FEDERAL PREROGATIVES

Appellants' jurisdictional statement erroneously claims that the Court of Appeals' decision strips the State of California of all regulatory authority of mining operations. Appellants' jurisdictional statement at 2, 4, and 14. In actuality, the decision will in no way hinder the state's ability to establish and enforce its own environmental quality standards.

The Court of Appeals expressly held that "a state may enact environmental regulations in addition to those established by federal agencies." Appendix at A-9. "There is simply a limit, clearly exceeded by the appellants in this case, on the degree to which a state can duplicate federal efforts to regulate mining on federal lands." *Id.*

Mining law has long recognized a limit on a state's ability to regulate mining on federal lands when such regulation interferes with the purposes of the federal mining laws or with the exercise of federally mandated authority. *See, e.g.,* Burling, *Local Control of Mining Activities on Federal Lands,* 21 Land & Water L. Rev. 33 (1986) (traces federal preemption of local regulation through the *Granite Rock* decision); *Brubaker v. Board of County Commissioners, El Paso County,* 652 P.2d 1050 (Colo. 1982).

Because state regulation of mining operations is endorsed by the Mining Law of 1872, 30 U.S.C. § 22, and because federal regulatory agencies have a long history of

cooperation with state authorities, *see* Appendix at A-88 through A-133, it is clear that federal regulation under the Mining Law of 1872 is not so pervasive that all local law must be preempted. The court below plainly recognized this. However, preemption inquiry does not end upon a finding that all local law is not excluded through a pervasiveness of regulation or occupation of the field analysis.

When a state statute obstructs attainment of federal statutory objectives, the issue arises whether the state statute is preempted by federal law. In many cases, local regulation of mineral exploration and development has been overturned due to conflict with federal mining law. *See, e.g., Brubaker v. Board of County Commissioners,* 652 P.2d 1050 (local ban on drilling preempted); *Elliott v. Oregon International Mining Co.,* 60 Or. App. 474, 654 P.2d 663 (1982) (restriction on mineral claimant's use of surface estate preempted); and *Ventura County v. Gulf Oil Corporation,* 601 F.2d 1080 (9th Cir. 1979), *aff'd,* 445 U.S. 947 (1980) (county drilling ban preempted). *See also* Burling, *Local Control of Mining Activities on Federal Lands,* 21 Land & Water L. Rev. 33.

As the Court of Appeals recognized, however, state regulation which incidentally discourages an activity is not automatically preempted by federal law which encourages the activity. Appendix at A-7. Rather, whether state regulation like the permitting requirement at issue in this case is preempted depends on whether it "seriously interferes" with the purpose of a federal law, federal prerogatives, or both. *Id.* In such circumstances, some state

permitting requirements, like those at issue here, may be *absolutely* preempted. Such regulations are not, as appellants contend, immunized from preemption just because they were not actually intended to prohibit federally approved activity, or are based on "reasonable" conditions.

The holding in *Granite Rock* that state permit requirements may be preempted is based upon the *First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 328 U.S. 152 (1946), doctrine that state regulations which interfere with federal purposes are preempted, and upon the preemption test that state laws may not interfere with the operation of federal law. In *First Iowa,* the Supreme Court held that because the Federal Power Act requires that a federal permit be obtained prior to the construction of a hydroelectric dam, the state could not also condition the construction of the dam upon the attainment of a state permit which specified new design parameters. Following this reasoning, the Ninth Circuit in *Ventura,* 601 F.2d 1080, concluded that because federal authorities had already issued drilling permits, the local authorities could not require separate drilling permits. *Ventura,* 601 F.2d at 1084.

Appellee and amici recognize that a local permit requirement is not *per se* preempted by a federal permit requirement for the same project. Thus, for example, in *Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission,* 461 U.S. 190 (1983), this Court held that a utility could be prevented from building a federally approved nuclear power plant by a state requirement that a state nuclear waste disposal certificate first be obtained.

In order to reconcile *Pacific Gas* with *First Iowa,* it is necessary to look beyond the mere existence of a federal permit requirement and consider exactly what activity is being authorized by the federal regulatory scheme. In cases like *First Iowa,* for example, it was found that the federal permit requirement was part of a comprehensive federal planning process intended to cover virtually all aspects of the construction of a hydropower dam. For that reason, the state could not dictate design parameters for the project if such state parameters conflicted with decisions made through the federal planning process. Similarly, in *Ventura County,* the federal drilling permit encompassed a federal decision to allow drilling on a particular parcel of federal property and the county was thus preempted from making an independent decision on an identical issue. In *Pacific Gas,* the federal permit requirement was designed to ensure the safety of nuclear power plant construction. Since the federal permitting regulation did not cover or even attempt to address such nonsafety issues as the economic aspects of waste disposal, the state was free to regulate in this area.

Applying this legal precedent to mining law, the court in *Granite Rock* reviewed the considerations governing the Forest Service's regulatory approval process of mining plans of operations. The court found that the purpose for requiring a plan of operations is to protect the surface resources and environment. Appendix at A-9. Although Forest Service regulations enact stricter environmental standards, but the final decision to allow or not to allow mining on federal lands rests with the Forest Service. *Id.* Thus, the court reasoned that although a state may urge

the Forest Service to reject or revoke a mining permit on state environmental grounds, the federal government alone has ultimate authority over environmental protection of the national forests and only the Forest Service may interfere with a federal mining permit. *Id.*

III

THE CONSISTENCY REVIEW PROCESS, FORSAKEN BY THE APPELLANTS, IS THE ONLY LEGAL MECHANISM AVAILABLE TO THE STATE FOR PARTICIPATING IN THE REGULATION OF MINING ON FEDERAL LANDS

The Ninth Circuit based its decision upon an analysis of the preemption of local permitting authority requirements and did not reach the issues of whether the mining claims at issue are outside the CZMA coastal zone and thus outside the region which the coastal commission can regulate directly. It is clear that unpatented mining claims within a National Forest fall squarely within the federal lands exclusion of the CZMA and thus the *only* way that the coastal commission can regulate the mining claims is through the consistency review process.

The CZMA was designed to facilitate such local regulation of the coastal zone. 16 U.S.C. §§ 1452(2), 1455. *See also* Conference Rep. No. 1544, 92d Cong. 2d Sess. 12, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4822 (legislative history showing purpose to prod states into protecting coastal resources). However, Congress also was very desirous to avoid state interference with land use planning by federal agencies on federal lands. For that reason,

Congress excluded from the coastal zone "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." 16 U.S.C. § 1453(1). The California Coastal Commission by state law also has no permit authority outside the coastal zone. Pub. Res. Code § 30604(d). Thus, the relevant question is whether mining claims are federal property within the Section 1453 federal lands exclusion. They surely are. Until such time as a mining claim is patented it is not segregated from the public domain. *Best v. Humboldt Placer Mining Company*, 371 U.S. 334, 336 (1963). Just because a claim *may* be patented in no way serves to segregate it from the public domain. Nor can it be argued that the federal government lacks any sort of regulatory discretion over the mining claim. *See, e.g., United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980) (regulation of mining claims by Forest Service upheld). *See also* Burling, *Local Control of Mining Activities on Federal Lands*, 21 Land & Water L. Rev. 33.

The CZMA also excludes lands held in trust from the coastal zone. National forests are lands held in trust for the people of the United States. *Light v. United States*, 220 U.S. 524, 536-37 (1911) ("all public lands of the nation are held in trust"). Because unpatented mining claims are still part of the national forests they still are lands held in trust by the United States and subject to the sole discretion of the United States. They are excluded from the coastal zone.

The federal government in its own regulations also determined that the public lands are excluded from the

coastal zone. Title 15, Code of Federal Regulations, § 923.33(a) (1985) states that, as a "requirement" for federal approval of a state's coastal program "[s]tates must exclude from their coastal management zone those lands *owned*, leased, *held in trust* or whose use is otherwise by law subject solely to the discretion of the federal government . . . ." (Emphasis added.) Thus, as a condition to coastal program approval the federal government requires that the 16 U.S.C. § 1453(1) exclusion be obeyed.

Because unpatented federal mining claims are within the federal lands exclusion of the CZMA, the coastal commission, if it wishes to participate in the active regulation of such mining claims, must participate in the consistency review process of 16 U.S.C. § 1456(c). This process enables state coastal agencies to cooperate with the federal government in ensuring that activities on *federal* lands do not adversely affect coastal zone resources. Once a state coastal agency is notified of pending federal action on federal lands that may affect the coastal zone, the state agency has six months to notify the federal agency that the consistency review process is required. 16 U.S.C. § 1456(c)(3)(A). If no action is taken, a conclusive presumption is established that the state concurs with the proposed operation. *Id.*

Here the coastal commission failed to take advantage of the consistency review provisions of the CZMA, 16 U.S.C. § 1456(c), and thus lost what Congress intended to be the *exclusive* mechanism for state land use planning in federal land affecting the coastal zone. Indeed, as the legislative history demonstrates "[f]ederal lands are not included within a state's coastal zone. As to the use of

such lands which would affect a state's coastal zone, the provisions of Section 307(c) [16 U.S.C. § 1456(c)] would apply." Conference Rep. No. 1544, 92d Cong. 2d Sess. 12, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4822. Thus, the coastal commission lost its only chance to participate in the planning of this mining operation and it has no further opportunity to become involved.

—o—

CONCLUSION

Jurisdiction does not lie in this appeal because no state statute has been declared unconstitutional; only the improper exercise beyond the enabling authority of a state and federal statute has been proscribed. The decision of the court below should be affirmed in order to facilitate congressionally mandated regulatory balance between state and federal regulation of mining activities on federal lands. In any event, the California Coastal Commission lacks regulatory jurisdiction over federal property expressly excluded from the state's coastal zone and the decision below should stand on that basis.

DATED: March, 1986.

Respectfully submitted,

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JOINT

APPENDIX

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No. 85-1200

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

CALIFORNIA COASTAL COMMISSION, ET AL.,
Appellants,
VS.
GRANITE ROCK COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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APPEAL DOCKETED JANUARY 15, 1986
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EDITOR'S NOTE

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RELEVANT DOCKET ENTRIES IN THE DISTRICT COURT

GRANITE ROCK COMPANY, a corporation,
Plaintiff,

vs.

CALIFORNIA COASTAL COMMISSION, an Administrative Agency of the State of California,
Defendant.

No. C-83-5137-WWS

Date	NR	Proceedings
October. 24, 1983	1	COMPLAINT: Summons issued.
November. 4, 1983	5	Plaintiff's First AMENDED COMPLAINT.
November. 30, 1983	7	Defendant California Coastal Commission's notice of motion & motion to dismiss and for sanctions. Set 12-29-83, 11 AM.
	8	Memo in support.
	9	—declaration of Linus Masouredis in support.
		RECEIVED: Proposed order.
December 15, 1983	12	Plaintiff's response to motion to dismiss.
December 29, 1983	17	MINUTES: (cr/Ray Linkerman) re Status held. Defendant Ca. Coastal's motion for dismissal—GRANTED and same defendant's motion for sanctions NOT RULED ON. Plaintiff's motion for summary judgment to be filed on 3-2-84. Defendant's response due 3-30-84, reply due 4-6-84 and hearing set on 4-13-84, 11 AM.

Date	NR	Proceedings
December 30, 1983	18	*ORDER* that defendant Coastal Commission's motion to dismiss on the ground that it is immune from the instant suit by virtue of 11th Amendment of U.S. Constitution—GRANTED. Entered in civil docket 1-3-84.
January 6, 1984	19	Defendants ANSWER TO AMENDED COMPLAINT
January 20, 1984	20	Defendants' 1st interrogatories & requests for admissions.
February 17, 1984	21	Plaintiff's notice of motion to stay discovery. Set 3-16-84, 11 AM.
	22	—points/authorities in support.
	23	—declaration of Barbara R. Banke.
March 2, 1984	25	Defendants' declaration of Linus Masouredis in opposition to # 21.
March 2, 1984	26	Plaintiff's notice of motion for summary judgment. Set 4-13-84, 11 A.M.
	27	—points/authorities in support of # 26.
		RECEIVED: Proposed order granting plaintiff's motion.
	28	Defendants' memo of points/authorities in opposition to # 21.
March 9, 1984	29	Plaintiff's reply memo in support of motion to stay discovery.
March 16, 1984	31	*ORDER* that motion to stay discovery is DENIED and plaintiff directed to respond to interrogatories by 3-23-84. WWS
March 23, 1984	32	Plaintiff's answer to 1st interrogatories & request for admissions.
March 30, 1984	36	Defendants' memo of points/authorities in opposition to motion for summary judgment.
	37	—declaration of Ansel Adams in support.
	38	—declaration of Saunders C. Hillyer in support.

Date	NR	Proceedings
	39	—declaration of Richard D. Zachentmayer.
	40	—declaration of Linus Masouredis.
May 9, 1984	45	Plaintiff's reply memo of points/authorities in support of motion for summary judgment.
May 10, 1984	46	Plaintiff's errata in answers to 1st interrogatories & requests for production.
May 21, 1984	47	*MEMORANDUM OF OPINION AND ORDER* that plaintiff's motion for summary judgment—DENIED. Action dismissed, re plaintiff not entitled to relief. WWS
		Entered in civil docket 5-22-84. Copies to counsel.
May 21, 1984	48	*JUDGMENT* that plaintiff's motion for summary judgment—DENIED. Judgment dismissing action shall be entered accordingly. Parties to bear own costs.
		Entered in civil docket 5-22-84, copies to counsel.
June 20, 1984	53	Plaintiff's NOTICE OF APPEAL. Fee paid, USCA # *84-2146*. Docket fee form mailed to USCA. Copies to counsel, Packet given.

RELEVANT DOCKET ENTRIES IN THE COURT OF APPEALS

GRANITE ROCK COMPANY, a corporation,
Plaintiff-Appellant,

vs.

CALIFORNIA COASTAL COMMISSION, an Administrative Agency of the State of California,
Defendant-Appellee.

No. 84-2146

D.C. No. Civ. C-83-5137-WWS

Date	Filings-Proceedings
June 26, 1984	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL FOR APPELLANT; COUNSEL FOR APPELLEE. ogm
August 3, 1984	Filed as of August 1, 1984, CERTIFICATE OF RECORD. (6/15/84) eal
September 28, 1984	Filed Orig. & 15 copies of aplt's opening brief (40 pgs + addum) & 5 Excerpts of Record in two volumes. 09/28 —ot—
October 16, 1984	Rec'd Orig. & 15 copies of Amicus Curiae (USA) brief. (17 pgs.) 10/15 [motion pending to file.] —ot—
October 30, 1984	Filed Orig. & 15 copies of Amicus Curiae (USA) brief. (17 pags) 10/15. prev/recvd. tsp
December 10, 1984	Filed as of 12/7, Orig. & 15 Appellees' briefs (45 pgs.) 12/7 (Oral extension granted until 12/7 to file brief, RGK). ogm
December 10, 1984	Filed as of Dec. 7 aple's mot. to strike portion of the aplt's addendum of the opening brief (12/7) (CIVATT) tsp
December 10, 1984	Filed as of Dec. 7 aple's request to take judicial notice. (12/7) (CIVATT) tsp

Date	Filings-Proceedings
December 17, 1984	Filed Order (Mot Atty/Dep Clk, SMJ) appellees' request to take judicial notice and motion to strike portions of the addendum to aplt's opening brief, both filed 12/7/84, are referred to the panel that hears this appeal on the merits. ogm
December 18, 1984	Filed as of Dec. 14 aple's point and authorities in opposition to aple's portions of addendum to aplt's opening brief. 12/14 (CIVATT) tsp
January 7, 1985	Filed of 1/3, Orig. & 15 Aplt's reply briefs. (25 pgs) 1/3 (Filed per Civatt.) ogm
January 8, 1985	FILED AS OF 8/1/84, CERT RECORD ON APPEAL IN THREE VOLUMES: PLDGS, VOLS. I and II, ORIG. ONLY; R/T's, VOL. III, ORIG. ONLY. ogm
March 14, 1985	ARGUED AND SUBMITTED BEFORE: WALLACE, POOLE, CJJ & STEPHENS, DJ wl
August 14, 1985	ORDERED OPINION (WALLACE) FILED AND JUDGMENT TO BE FILED AND ENTERED.
August 14, 1985	FILED OPINION—REVERSED.
August 14, 1985	FILED AND ENTERED JUDGMENT. EM
August 28, 1985	Filed appellees' Petition for Rehearing with Suggestion for Rehearing En Banc. (15 pgs) 8/28 Panel & Active Judges. EM
August 29, 1985	Filed aplt's bill of costs. 8/28 EM
September 3, 1985	Filed aples' objection to bill of costs. 08/30 —ot—
October 17, 1985	Filed order (WALLACE, POOLE and STEPHENS) The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected. vt
October 25, 1985	MANDATE ISSUED.
November 7, 1985	MANDATE ISSUED COSTS TAXED

Date	Filings-Proceedings
November 8, 1985	Filed aples' notice of appeal to the Supreme Court of the United States. 11/08 —ot—
January 27, 1986	Rec'd SC notice of filing an appeal on 01/15/86. # 85-1200 —ot—

United States District Court
Northern District of California

No. C-83-5137-WWS

Granite Rock Company, a corporation,
Plaintiff,

vs.

California Coastal Commission, et al.,
Defendants.

[Filed Nov. 4, 1983]

AMENDED COMPLAINT FOR DECLARATORY RELIEF, INJUNCTION

Plaintiff Granite Rock Company, a corporation, alleges against the defendants California Coastal Commission, Melvin Nutter; Carolyn McNeil; Steve MacElvaine; Donald McInnis; Marshall Grossman; George Shipp, III; Thomas Murray, Jr.; Michael Wornum; Robert Franco; Dorill Wright; Leo King; C. Patrick Callahan; Dr. Gordon F. Snow; Dwight Sanders; Susan Golding; and Edward Brown, the following:

FIRST CLAIM FOR RELIEF
(Declaratory Relief 28 U.S.C. § 2201)

I

Plaintiff, Granite Rock Company, is a corporation organized and operating in the State of California, and maintaining its principal place of business in the County of Santa Cruz, State of California.

II

Defendant, California Coastal Commission, is an administrative agency of the State of California, created and existing by virtue of the California Coastal Act of 1976, and is authorized by said statute to administer the provisions of same. Said Defendant

is the agency, as provided in the Federal Coastal Zone Management Act of 1972, designated by the State of California to make a determination that a certificate of consistency with the California Coastal Program, a plan developed by the California Coastal Commission, is required.

III

Defendant Melvin Nutter is the Chairman of the California Coastal Commission. Defendant Carolyn McNeil is the Vice Chairman of the California Coastal Commission.

Defendants Steve MacElvaine, Donald McInnis, Marshall Grossman, George Shipp, III, Thomas McMurray, Jr., Michael Wornum, Robert Franco, Dorill Wright, Leo King, and C. Patrick Callahan are voting members of the California Coastal Commission. Defendants Dr. Gordon F. Snow, Dwight Sanders and Susan Golding are non-voting representatives of the California Coastal Commission. Defendant Edward Brown is the District Director for the Central Coast District of the California Coastal Commission. Said defendants are sued individually in their official capacities as members of the California Coastal Commission. Said defendants are empowered to enforce the provisions of the California Coastal Act, and the Federal Coastal Zone Management Act, including but not limited to Certificate of Consistency and permit requirements.

IV

Jurisdiction of this action is based on Title 28 U.S.C. § 1331. The matter in controversy arises under the Constitution and laws of the United States, particularly under the Property Clause, Article 4, Section 3, Clause 2; the Supremacy Clause, Article 6, Clause 2; the Mining Act of 1872; 30 U.S.C. § 21, *et seq.*; 16 U.S.C. § 478 and 551 and official regulations concerning use of surface resources on National Forest land; 38 C.F.R. § 228.1, the Federal Coastal Zone Management Act., 16 U.S.C. § 1451, *et seq.*, and official regulations promulgated thereunder; and California Resources Code § 30334.

V

The value of Plaintiff's right to conduct its mining operation on unpatented mining claims, without interference by the California Coastal Commission, is in excess of the sum or value of $15,000.

VI

Plaintiff is engaged in the business of mining limestone in the Big Sur area of Monterey County. Plaintiff presently conducts its mining operation on unpatented mining claims on federal public lands in the Los Padres National Forest (hereinafter federal lands).

VII

Congressional authority to enact laws affecting federal lands is derived from the Property Clause (U.S. Const. Art. 4, § 3, Cl. 2). Congress has enacted the Mining Act of 1872 (30 U.S.C. § 21 *et seq.*) affecting use and disposition of the subject federal lands. Congress has delegated regulatory power over surface resources on the subject federal lands to the Secretary of Agriculture (16 U.S.C. §§ 478 and 551). The Secretary of Agriculture has promulgated regulations concerning mining on federal lands (36 C.F.R. § 228.1, *et seq.*).

VIII

Said regulations require that Plaintiff submit a Plan of Operations to the Forest Service prior to conducting mining activities on its unpatented mining claims, and that Plaintiff's mining activities comply with said Plan of Operations.

IX

Plaintiff has complied with the Plan of Operations requirements set forth in 36 C.F.R. § 228.1, *et seq.* Plaintiff's Plan of Operations was accepted by the Forest Service on or about February 12, 1981.

X

Plaintiff is currently conducting mining operations on the subject federal lands within the meaning of 36 C.F.R. § 278.3(a).

Plaintiff's mining activities are being conducted pursuant to said federal regulatory scheme.

XI

Title to the subject federal lands is held in trust by the Federal Government. Lands held in trust by the Federal Government are excluded from the coastal zone (16 U.S.C. § 1453(1)). The subject federal lands are not within the jurisdictional boundaries of the California Coastal Zone and are exempt from regulation and enforcement by Defendant-members of the California Coastal Commission.

XII

Pursuant to 15 C.F.R. § 930.54 and State designation, the California Coastal Commission, through its members, must assert that it has the power to review said Plan of Operations within thirty (30) days of receiving notice of the Forest Service review of said Plan. Members of the California Coastal Commission had actual notice of the Forest Service activity of reviewing Plaintiff's Plan of Operations referred to in paragraph XIV hereof on or before December 23, 1980. Defendants did not assert that the California Coastal Commission has a right to review the Plan of Operations for consistency with the California Coastal Zone within 30 days of December 23, 1980, thereby waiving its right to assert it has power to review the Plan of Operations.

XIII

The market for limestone is a market of national significance. Plaintiff Granite Rock Company has mining claims on a limestone deposit of national significance.

XIV

Defendants contend that:

1. Plaintiff's mining claims, even though on federal land, were not excluded from the coastal zone by the Federal Coastal Zone Management Act;

2. The approval by the U.S. Forest Service of Plaintiff's Plan of Operations constituted the granting of a federal license or

permit to conduct an activity which will affect land or water uses in the California Coastal Zone within the meaning of Section 1456(c)(3) of the Federal Coastal Zone Management Act, and hence such Plan of Operations had to be consistent with the California Coastal Management Program.

3. Plaintiff had an obligation to submit to the California Coastal Commission, for review or approval, a certification of consistency with the state's coastal management program.

Said contentions were manifested by a letter from Defendant Edward Brown of the Coastal Commission to the Plaintiff dated October 17, 1983.

XV

Plaintiff contends that:

1. Plaintiff's mining claims are on federal land and hence excluded from the Coastal Zone by the Federal Coastal Zone Management Act. 16 U.S.C. § 1453.

2. Acceptance of Plaintiff's Plan of Operations by the Forest Service was not the issuance of a federal license or permit.

3. Plaintiff is not required to file a certificate of consistency with the California Coastal Management Program.

4. Even assuming, *arguendo*, that Plaintiff was required to obtain a certificate of consistency, Defendants waived any and all rights to require a certificate of consistency, as they did not notify the Forest Service and the Plaintiff within 30-days of notice of the Plan of Operations according to 15 C.F.R. 930.54(a).

5. That federal laws and regulations have pre-empted State authority to regulate plaintiff's mining claims on federal lands.

XVI

An actual controversy has arisen and now exists between Plaintiff and Defendants, and Plaintiff desires a judicial determination of its rights and duties, and a declaration that:

1. Plaintiff's mining claims are on federal land and hence excluded from the Coastal Zone by the Federal Coastal Zone Management Act. 16 U.S.C. § 1453.

2. Plaintiff is not required to file a consistency certificate under the Federal Coastal Zone Management Act.

3. Plaintiff's mining claims on federal land are not subject to State regulatory jurisdiction.

4. Defendants' authority to regulate Plaintiff's mining claims on federal lands has been pre-empted by federal laws and regulations.

A judicial declaration is necessary and appropriate at this time under the circumstances in order that Plaintiff may ascertain its rights and duties under its Plan of Operations.

SECOND CLAIM FOR RELIEF
(Injunction Federal Rule 65)

I

The allegations of paragraphs I through XVI of the First Cause of Action for Relief are incorporated herein by reference, as if set forth in full herein.

II

The action of Defendants in requiring that Plaintiff submit a certification of consistency with the State Coastal Management Program for its existing mining operations pursuant to a valid Plan of Operations on federal lands totally frustrates the Congressional purpose of regulating federal lands. The uniformity of regulation of unpatented mining claims is rendered impossible. Defendants' actions would also expose Plaintiff to conflicting regulatory schemes, substantial expense and undue delay, and the prospect of violating federal law by complying with the California Coastal Commission requirements.

III

Enforcement of the State Coastal Commission requirement will result in irreparable injury as the amount of Plaintiff's damages is not presently ascertainable.

IV

Existing and continuing action by the Defendants is depriving and will deprive plaintiff of the rights, privileges and immunities secured by the Supremacy Clause and the Property Clause (Art. 4, Section 3, Clause 2) of the Constitution, and of its rights under the Mining Law of 1872, the Federal Coastal Zone Management Act and the regulations promulgated thereunder.

V

The application of the State Coastal Act to Plaintiff's mining claims of federal lands:

(a) is incompatible with the dominant federal interest in and uniform federal regulation of unpatented mining claims and federal land;

(b) will require Plaintiff to apply for a permit for its mining activities on federal lands, despite the fact that Congress expressly rejected such a requirement for federal lands in enacting the Federal Coastal Zone Management Act; and

(c) will require Plaintiff to apply for a certificate of compliance for its existing 1981-1986 Plan of Operations, despite the fact that Congress through its delegated representative in the Federal Coastal Zone Management Act, expressly required that the California Coastal Commission notify the Forest Service and Plaintiff within Thirty (30) days of notice of the Plan of Operations and that failure to provide said notice would result in a waiver of any right to require a certificate of consistency.

VI

By reason of the foregoing, the requirements of the California Coastal Act, as applied, are pre-empted by federal law, are in conflict with the federal regulatory scheme, contravene the Federal Coastal Zone Management Act, and violate the Supremacy Clause of the Constitution.

WHEREFORE, Plaintiff prays that:

1. This Court declare that Plaintiff's Plan of Operations for 1981-1986 is not required to be consistent with the California Coastal Program;

2. This Court declare that the Defendants have no jurisdiction ro regulate Plaintiff's mining activities on the subject federal lands.

3. This Court declare that federal laws and regulations have pre-empted the right of the Defendants to regulate Plaintiff's mining claims on federal lands, and that any regulation of said mining claims by Defendants is null and void and unconstitutional pursuant to the Supremacy Clause and Property Clause of the Constitution.

4. This Court order that Defendants, their successors in office, their agents, servants, employees and attorneys, and all persons in active concert or participation with them, be temporarily, preliminarily and permanently enjoined from taking any action to enforce the California Coastal Act, or any other provision of state law incorporated by reference therein, or any other orders, rules or regulations issued thereunder to Plaintiff's unpatented mining claims and other rights on federal land.

5. Plaintiff have whatever other relief the Court deems necessary and proper.

Date: November 4, 1983.

Goldstein, Barceloux & Goldstein
Jess S. Jackson P.C.
and
Ropers, Majeski, Kohn, Bentley,
Wagner & Kane

By /s/ BARBARA BANKE
Barbara R. Banke
Attorneys for Plaintiff

[Proof of service by mail omitted in printing]

United States District Court
Northern District of California

[Caption omitted in printing]

[Filed Jan. 6, 1984]

ANSWER TO AMENDED COMPLAINT FOP DECLARATORY RELIEF AND INJUNCTION

Defendants Melvin Nutter, Carolyn McNeil, Steve MacElvaine, Donald McInnis, Marshall Grossman, George Shipp III, Thomas McMurray Jr., Michael Wornum, Robert Franco, Dorill Wright, Leo King, C. Patrick Callahan; Dr. Gordon F. Snow, Dwight Sanders, Susan Golding and Edward Brown ("defendants") answer the separately numbered paragraphs of the amended complaint of plaintiff Granite Rock Company ("Granite Rock") as follows:

FIRST CLAIM FOR RELIEF
(Declaratory Relief 28 U.S.C. § 2201)

I

Defendants admit the allegations of this paragraph.

II

Defendants admit the allegations of this paragraph, except insofar as this paragraph suggests that the California Coastal Commission can be properly named a defendant in this action.

III

Defendants admit the allegations of this paragraph except that defendants deny that defendant Edward Brown or the individual Coastal Commissioner defendants are individually empowered to enforce the provisions of the California Coastal Act and the Federal Coastal Zone Management Act (CZMA). Defendants allege that the California Coastal Commission, acting as a collective body of individual Commissioners, is empowered to enforce said Acts.

IV

Defendants admit the allegations of this paragraph including the allegation that the Court has subject matter jurisidiction pursuant to 28 U.S.C. section 1331 (federal question).

V

Defendants lack sufficient knowledge and information as to the value of Granite Rock's right to conduct mining operations on its unpatented mining claims, and therefore defendants deny this allegation. Defendants also deny that Granite Rock has a right to conduct such operations free of Coastal Commission regulation under the Coastal Act and the Coastal Zone Management Act.

VI

Defendants admit that Granite Rock is engaged in the business of mining limestone in the Big Sur area of Monterey County, and that such activities are also being conducted on federal lands in the Los Padres National Forest. Defendants lack sufficient knowledge and information as to the patented or unpatented, or the perfected status of Granite Rock's mining claims, and therefore defendants deny the allegations of this paragraph to that extent.

VII

Insofar as this paragraph states only legal conclusions, no answer is required.

VIII

Insofar as this paragraph states only legal conclusions, no answer is required.

IX

Defendants admit that in 1981 the U.S. Forest Service accepted Granite Rock's Plan of Operations for the five year term of 1981-86. Except as admitted, defendants deny the remaining allegations of this paragraph.

X

Defendants admit that Granite Rock is currently conducting mining operations on federal lands, but deny the remaining allegations of this paragraph.

XI

Defendants admit that formal legal title to the subject federal lands is held by the Federal Government, subject to Granite Rock's mining claims on said lands. Except as admitted, defendants deny the remaining allegations of this paragraph.

XII

Defendants admit that pursuant to the regulations implementing the Coastal Zone Management Act, 15 C.F.R. section 930.54(a), a state agency must notify a federal agency and a federal permit applicant that the proposed activity for which a federal permit is sought, requires state agency review under the Coastal Zone Management Act. Defendants also admit that pursuant to 15 C.F.R. section 930.54(a), a state agency should provide such notification within 30 days of receiving actual notice of the federal permit application, or else the state agency will waive its right to review the proposed activity. Defendants also admit that the Coastal Commission did not notify the Forest Service that Granite Rock's application for its 1981-86 Plan of Operations required Coastal Commission CZMA review within 30 days after the Commission received actual notice of Granite Rock's application for said Plan of Operations. Defendants also allege that they are waiving, and are not asserting or claiming any right to review Granite Rock's existing 1981-86 Plan of Operations under the CZMA. Defendants allege that they are only asserting and claiming a right to review any future Plan of Operations or any future amendment of Granite Rock's existing 1981-86 Plan of Operations, and that such claim as to future plans was stated in a October 17, 1983 letter from defendant Edward Brown to Granite Rock's president, Bruce Woolpert. Except as admitted, defendants deny the remaining allegations of this paragraph.

XIII

Defendants lack sufficient knowledge and information to answer the allegations of this paragraph and therefore deny said allegations.

XIV

Defendants admit that they contend:

1. That Granite Rock's limestone mining operations on federal land in the Los Padres National Forest are not excluded from the coastal zone by the CZMA;

2. That approval by the U.S. Forest Service of Plans of Operation for Granite Rock's mining activities constitute the granting of a federal license or permit within the meaning of the CZMA, 16 U.S.C. section 1456(c)(3), and that such mining operations in the Los Padres National Forest are subject to Coastal Commission review for consistency with California's federally-approved Coastal Zone Management Program;

3. That Granite Rock has an obligation to submit future applications for Plans of Operation and future amendments to Granite Rock's 1981-86 Plan of Operations to the Coastal Commission for review and a determination of consistency with California's federally-approved Coastal Zone Management Program; and

4. That said contentions were manifested to Granite Rock in an October 17, 1983 letter from defendant Edward Brown to Granite Rock's president, Bruce Woolpert, a copy of which is attached hereto as Exhibit A. Except as admitted, defendants deny the remaining allegations of this paragraph.

XV

Defendants admit that Granite Rock makes the contentions stated in this paragraph. Defendants however, deny the validity of said contentions, except that defendants do not contest that the Coastal Commission has waived its right to review Granite Rock's existing 1981-86 Plan of Operations for CZMA consistency purposes under the 30 day notification period of 15 C.F.R. section 930.54(a).

XVI

Defendants admit that Granite Rock desires a judicial determination of its rights and duties and a declaration to the effect stated in subparagraphs 1 through 4 of this paragraph, but defendants deny that Granite Rock is entitled to a substantive declaration of that kind. Defendants admit that an actual controversy has arisen and exists between defendants and Granite Rock as to:

1. Whether Granite Rock's mining operations, after the October 17, 1983 date of the letter from defendant Edward Brown to Granite Rock's president, are subject to the coastal permit requirements of the California Coastal Act, Cal. Public Resources Code section 30000 et seq.; and

2. Whether Granite Rock's future Plans of Operation and future amendments to Granite Rock's existing 1981-86 Plan of Operations are subject to Coastal Commission consistency review under the CZMA.

Defendants also admit that a judicial declaration as to the actual controversy outlined above is necessary and appropriate at this time. Except as admitted, defendants deny the remaining allegations of this paragraph.

SECOND CLAIM FOR RELIEF
(Injunction Federal Rule 65)

I

Defendants incorporate herein their answers to paragraphs I through XVI of the First Cause of Action.

II

Defendants deny the allegations of this paragraph.

III

Defendants deny the allegations of this paragraph.

IV

Defendants deny the allegations of this paragraph.

V

Defendants deny the allegations of this paragraph, and specifically deny that the Coastal Commission has requested or is seeking to require Granite Rock to submit a certificate of consistency for Granite Rock's existing 1981-1986 Plan of Operations.

VI

Defendants deny the allegations of this paragraph.

AFFIRMATIVE DEFENSES

Defendants allege the following separate and independent affirmative defenses;

No Actual Controversy

1. Insofar as the Complaint seeks a declaration that Granite Rock is not required to submit a consistency certification to the Coastal Commission under the CZMA for its existing 1981-86 Plan of Operations, no live actual controversy appropriate for judicial decision is presented because defendants do not contend that a consistency certification for the existing 1981-86 Plan of Operations is required.

Ripeness

2. Insofar as the complaint seeks a declaration that all state agency regulation of Granite Rock's mining operations is preempted by federal regulation of such activities, the action is overbroad and lacking in the requisite ripeness. The only state agency regulation that has been asserted against Granite Rock by defendants is that under the Coastal Act of 1976, Cal. Public Resources Code section 30000 et seq. and the CZMA. Therefore the only actual controversy that is ripe involves the applicability of solely these statutes and no others.

WHEREFORE, defendants pray that:

1. Granite Rock be denied the injunctive, declaratory and other relief that it seeks;

2. That the Court declare:

a. That Granite Rock's mining operations conducted after October 17, 1983 are subject to the coastal permit requirements of the California Coastal Act, Cal. Public Resources Code section 30000 et seq.; and,

b. That Granite Rock's future Plans of Operation for its mining operations and future amendments to Granite Rock's existing 1981-86 Plan of Operations are subject to Coastal Commission consistency review under the CZMA; and

4. That defendants be awarded such other and further relief as the Court deems just and proper.

Dated: January 6, 1984

John K. Van De Kamp,
Attorney General of the
State of California

Andrea Sheridan Ordin,
Chief Assistant
Attorney General,
Public Rights

N. Gregory Taylor,
Assistant Attorney General

Joseph Barbieri
Deputy Attorney General

/s/ LINUS MASOUREDIS
Linus Masouredis,
Deputy Attorney General
Attorneys for Defendants.

[Declaration of service by mail omitted in printing]

Exhibit A

[Letterhead]

California Coastal Commission
Central Coast District
701 Ocean Street, Room 310
Santa Cruz, CA 95060
(408) 426-7390

Mr. Bruce Woolpert, President
Granite Rock Company
P.O. Box 151
Watsonville, California 95077

October 17, 1983

Re: *Pico Blanco Mining Activities*

Dear Mr. Woolpert:

This letter is to advise you that the surface mining and related development activities at Pico Blanco within Los Padres National Forest are subject to the regulatory provisions of the California Coastal Act of 1976 and the federal Coastal Zone Management Act of 1972, as amended ("CZMA").

As you know, our agency has been studying this jurisdictional question for some time. Our review of relevant facts and law indicates that these mining activities clearly come within the ambit of the comprehensive coastal zone regulatory regime established by these federal and state laws. Because of the significant control and authority enjoyed by Granite Rock Company over the land subject to its mining claims at Pico Blanco and the concommitant significant diminution of federal discretionary control, this land cannot be included among the federal lands excluded from the coastal zone by the CZMA (see 16 U.S.C. 1453). Consequently, because the land is located seaward of the coastal zone boundary established by the state legislature effective January 1, 1977, it is subject to the permit requirements of the California Coastal Act.

This letter will serve to notify Granite Rock of its obligation to apply to the Coastal Commission for a coastal development permit for any development, as defined in Section 30106 of the

Coastal Act, at the site undertaken after the date of this letter. Staff does not propose to recommend that the Commission undertake enforcement of the permit requirements for development already completed on this date. We ask that the permit application be submitted no later than November 15, 1983.

Our review of this matter has also indicated that approval by the U.S. Forest Service of plans of operation of mining activities such as those at the Pico Blanco site constitute granting of a federal license or permit, within the meaning of Section 1456(c)(3) of the CZMA. (See, also, 15 C.F.R. 930.51(a).) Accordingly, because the permit activities would affect the coastal zone, plans of operation are subject to the federal consistency requirements of the CZMA, and before any such plan can be approved for Pico Blanco mining activities it must be consistent with the California Coastal Management Program. The procedures governing this process appear in the federal regulations, 15 C.F.R. 930, Subpart D. A copy is enclosed for your convenience.

Granite Rock is hereby notified of its obligation to prepare and submit for Coastal Commission review and approval a certification of consistency with the state's coastal management program and for any future plan of operations or any future amendment of a plan of operation.

This office stands ready to assist you in whatever way we can in regard to these requirements. For this purpose or if you wish to discuss these matters, please feel free to contact me or staff counsel Mary Hudson in our San Francisco office (415) 543-8555.

Very truly yours,

/s/ EDWARD Y. BROWN
Edward Y. Brown
District Director

EYB/crm
Enclosure
cc: Michael L. Fischer
Mary Hudson
William Peters
Bob Slimmon
Joe Barbieri

United States District Court
Northern District of California

[Caption omitted in printing]

[Filed March 30, 1984]

DECLARATION OF RICHARD D. ZECHENTMAYER

I, Richard D. Zechentmayer, declare and state as follows:

1. I am currently the Planning and Lands Officer for the U.S. Forest Service, Los Padres National Forest, Monterey Ranger District. The Monterey Ranger District offices of the U.S. Forest Service are located at 406 South Mildred, King City, California.

2. At the time Granite Rock Company submitted its 1981-86 Plan of Operations to the U.S. Forest Service, I was the Acting District Ranger who approved Granite Rock's Plan of Operations on behalf of the Forest Service.

3. U.S. Forest Service files in King City, which are under my custody and control, contain Granite Rock's initial Plan of Operations, the modified Plan of Operations as approved by the Forest Service, and the Environmental Assessment for Granite Rock's Plan of Operations.

4. Attached to this declaration as Exhibits A, B, and C, respectively, are true and correct copies of,

A—The initial Plan of Operations for 1981-86, as submitted by Granite Rock;

B—Modifications to the Plan of Operations that were included by the Forest Service;

C—The Environmental Assessment for Granite Rock's Plan of Operations, and attached Appendices, that were prepared by the Forest Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at King City, California on March 23, 1984.

/s/ RICHARD D. ZECHENTMAYER
Richard D. Zechentmayer
U.S. Forest Service

EXHIBIT A

APPENDIX A

PICO BLANCO
REQUIREMENTS OF PLAN OF OPERATIONS

1. CLAIMANT
   Granite Rock Company
   Post Office Box 151
   Watsonville, CA 95076

2. CLAIM
   Lode and Placer (see attached list)

3. REPRESENTATIVE
   Maurice Alsop
   Post Office Box 1148
   Monterey, CA 93940

4 LOCATION
   The site is located within the northwest quarter, Section 1, T19S, R1E, MDM.

5. ACCESS
   The most direct access to the property is through private property that enters 200 feet south of the Little Sur Bridge off Highway 1. Private access is by Granite Rock Company right-of-way across the Hill Ranch as shown on Exhibit I. A more direct access is planned. This would be a newly constructed road following the South Fork of the Little Sur River, exiting off Old Coast Road crossing the South Fork River and proceeding to the mine site.

6. STREAM CROSSINGS
   The existing access does not cross any streams, except that portion that uses the existing county road. The proposed access, (South Fork Road) will necessitate a bridge crossing of the South Fork of the Little Sur River.

7. OPERATIONS

   The existing and proposed operation consists of exploratory open-pit mining of high-quality, white limestone. The material will be stripped by bulldozer, drilled and shot with

ANFO, loaded out by front-end loader, and hauled by highway type dump trucks to an off-site crushing plant where it will be sized and prepared for further processing.

8. WATER DISCHARGE AND TAILINGS DISPOSAL
The present operation will be a dry type with water being used only for dust control purposes. Overburden and waste disposal will be accomplished by filling protected ravines located adjacent to the access road.

9. SETTLING PONDS
n/a

10. PLANT SET-UP
No plant is currently planned for this initial exploratory operation; however, a jaw crusher/screening plant will be used once the operation proves to be a reliable source of limestone.

11. SURFACE DISTURBANCE
The initial phase of this project will cover an area of approximately two acres with vegetative cover being disturbed on at least a one-acre parcel. This vegetative cover consists of native sparse soil and grasses with occasional native shrubs: Coyote Brush, Greasewood, California Hollies, Currant.

12. REHABILITATION
Initial rehabilitation will take the form of some screen planting with native shrubs along the road edge to screen the site from potential views along the Jackson Trail. The mining face will be left with a rough appearance producing a sculptured look emulating the natural outcroppings. (See Exhibit 3)

13. TIMING
Operations and development have been underway at this site since April 18, 1962. Depending upon the mining plan chosen and the success of the test marketing, current reserves indicate operations in excess of 50 years.

14. EQUIPMENT
The following equipment is presenting in use at this operation: Cat D6; Komatsu 60; Ingersoll Rand 4½" Crawler-Driller Rig; two trucks; one eight-yard and one-ten yard; Cat 977 front-end loader, Gallion road grader.

15. MANPOWER
Present operations include a supervisor with four full time employees.

16. MAP
See Exhibits 2 and 4.

Please refer to the applicable serial number on all future correspondence with this office.

Your mineral locations have been assigned the following numbers:

Serial Number	Claim Name
CA MC 6007	Pico 1
CA MC 6008	Pico 2
CA MC 6009	Pico 3
CA MC 6010	Hayfield
CA MC 6011	Pico 5
CA MC 6012	Pico 6
CA MC 6013	Pico 7
CA MC 6014	Pico 8
CA MC 6015	Pico 9
CA MC 6016	Pico 10
CA MC 6017	Pico 11
CA MC 6018	Pico 12
CA MC 6019	Pico 13
CA MC 6020	Pico 14
CA MC 6021	Pico 15
CA MC 6022	Pico 18
CA MC 6023	Blanco 1
CA MC 6024	Blanco 2
CA MC 6025	Blanco 3
CA MC 6026	Blanco 4
CA MC 6027	Blanco 5
CA MC 6028	Blanco 6
CA MC 6029	Blanco 7
CA MC 6030	Blanco 8
CA MC 6031	Blanco 9
CA MC 6032	Blanco 10
CA MC 6033	Blanco 11
CA MC 6034	Blanco 12
CA MC 6035	Blanco 13
CA MC 6036	Blanco 14
CA MC 6037	Blanco 15
CA MC 6038	Blanco 16

EXHIBIT I
PROPRIETARY DATA
NOT SUBJECT TO PUBLIC REVIEW



EXHIBIT 2
PROPRIETARY DATA
NOT SUBJECT TO PUBLIC REVIEW

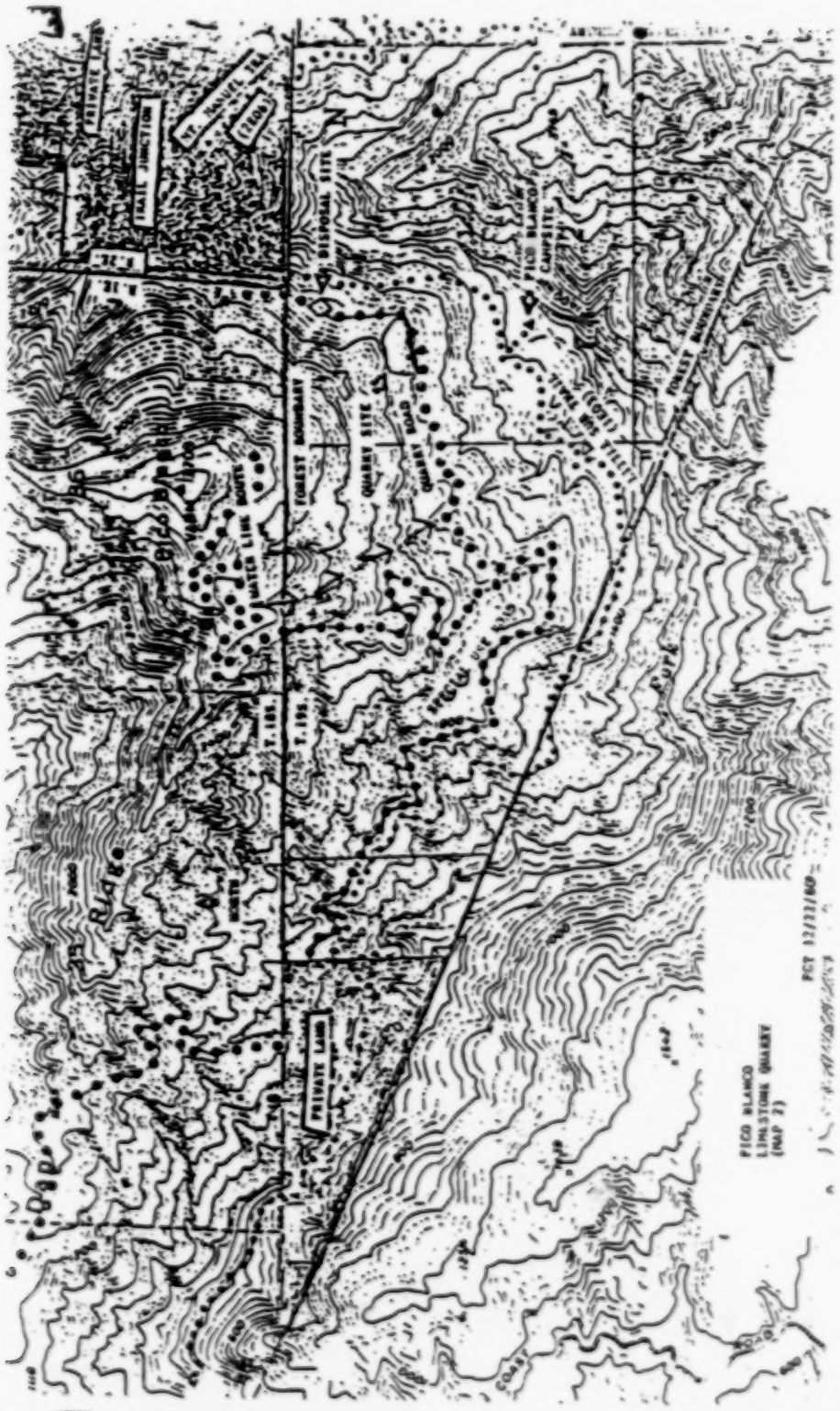


EXHIBIT 3

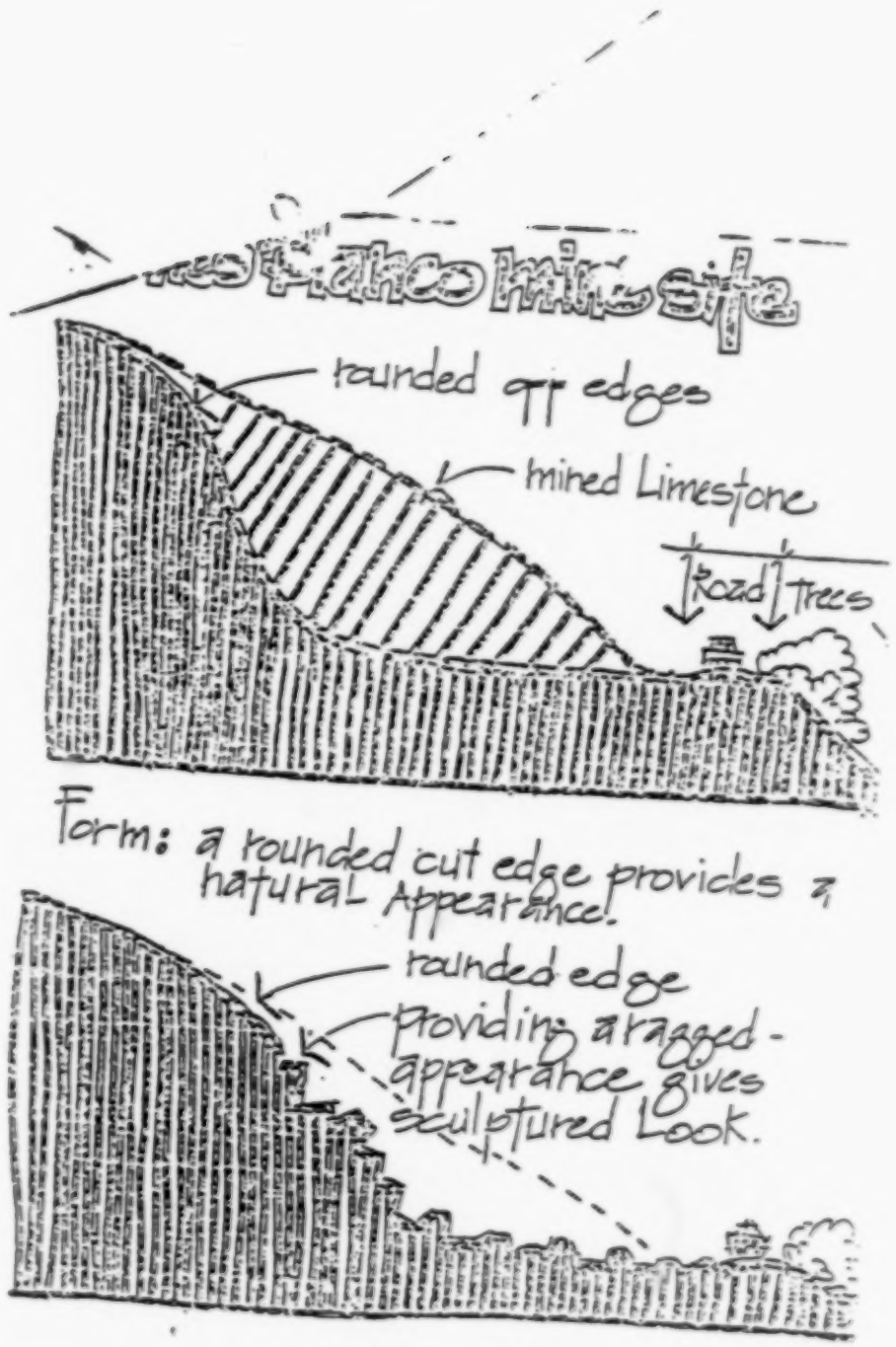


EXHIBIT 3

EXHIBIT 4

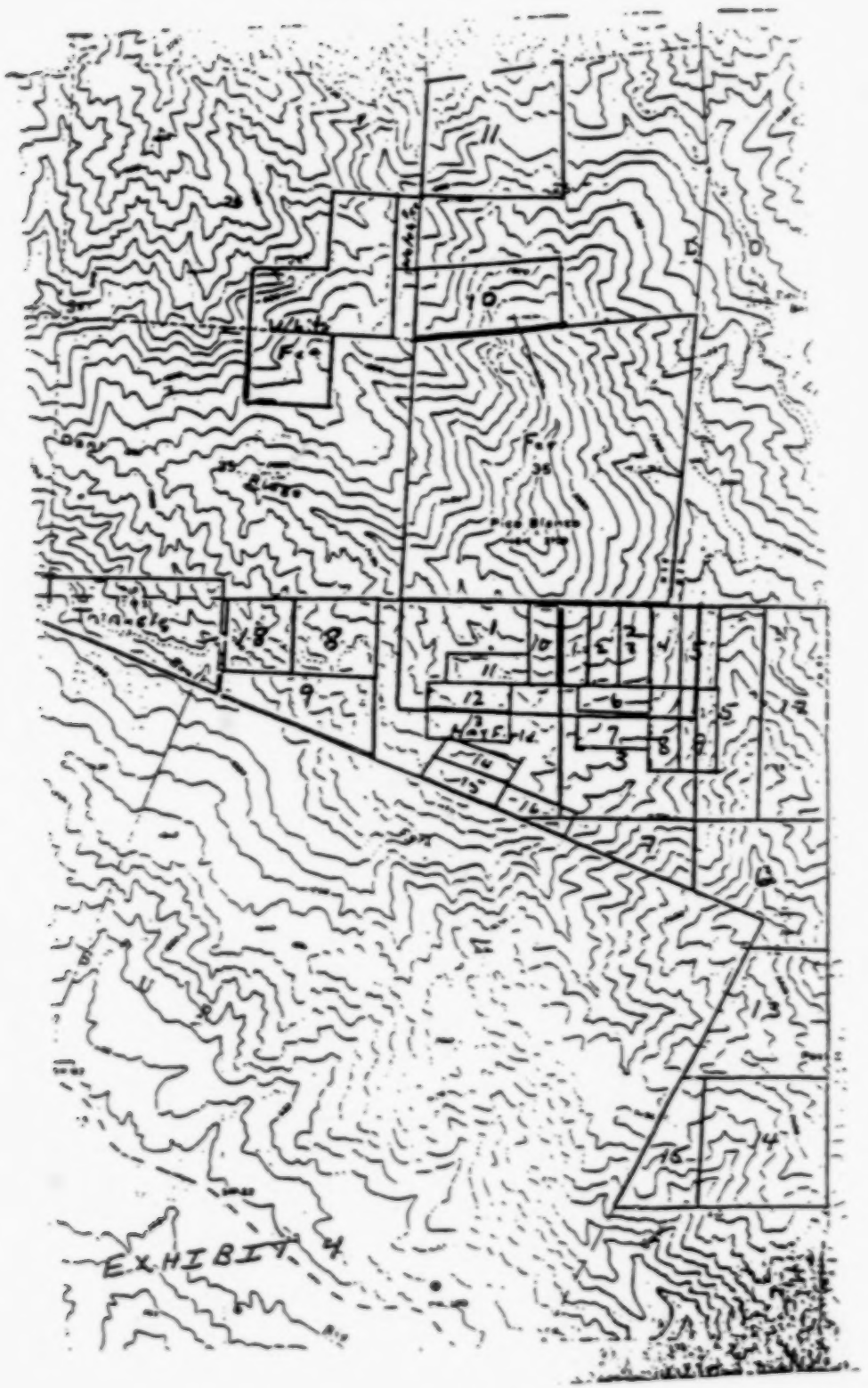


EXHIBIT B

APPENDIX F

PICO BLANCO
PLAN OF OPERATIONS
(MODIFIED)

1 CLAIMANT
Granite Rock Company
Post Office Box 151
Watsonville, CA. 95076

2. CLAIM
Blanco 1—CA MC 6023 LODE
Blanco 2—CA MC 6024 LODE
Blanco 3—CA MC 6025 LODE
Blanco 4—CA MC 6026 LODE
PICO 2—CA MC 6008 PLACER

3. REPRESENTATIVE

Maurice Alsop
Post Office Box 1148
Monterey, CA. 93940

Ray Johnson
Post Office Box 151
Watsonville, CA. 95076

4. LOCATION
Section 1 NW¼
T19S, R1E, MDM

5. ACCESS
Access on National Forest System lands is via a Special Use Road granted November 8, 1963 and an access road that transects Blanco Claims 1-4, and 10-12 (Map 1). Roads will be maintained to levels specified by the U.S. Forest Service. Neither road crosses any streams while on NFS lands.

6. OPERATIONS (INCLUDES MITIGATION)
Operation will require the removal of overburden to a disposal and storage site as designated on Map 1. The disposal site will be approximately 40′ x 150′ x 150′ in size. As work proceeds, the disposal site will be landscaped to repeat existing land forms. Vegetation which predominates in the area will be planted on the site for slope stabilization and visual mitigation.

When the disposal site reaches the level of the existing road, the site will be used for the temporary storage of overburden. The stored overburden will be placed back against the mine face as excavation activities are completed. This activity will help mitigate contrasting shades between the mine face and the surrounding slopes. Existing side case overburden will be covered with straw and seeded with adapted grasses. The Forest Service will identify the location and species composition of vegetation to be planted by the operator.

During blasting operations Pico Blanco Camp and the Little Sur Trail (11S03) will be closed by the operator ½ hour prior to the scheduled blast time, ¼ mile above and below the blast site and certify in writing that no one is in the area. Upon conclusion of the blasting operation the trail and camp will be reopened for public use after a representative of Granite Rock has walked the area and certified in writing that no hazards exist.

The purpose of the blasting operations will be to fracture the ore body. The explosive ANFO will be the primary type of explosive used.

A front-end loader will be used to load the ore in highway type dump trucks. The limestone will then be hauled to an off-site crushing plant for further processing.

Water lines, coming from company lands, will be laid on the ground in sheltered ravines and along the road edge (Map 1). Water will be used for dust abatement along the haul road. At the completion of the project, water lines will be removed from the site.

An approved Fire Prevention Plan will be implemented 30 days after receipt from the Monterey District Ranger.

Granite Rock is responsible for obtaining all required permits established by Federal, State or local agencies having jurisdiction for environmental components not under the enforcement authority of the U.S. Forest Service. Copies of permits, attainment targets or monitoring requirements will be sent to the District Ranger, who will attach it to the Plan of

Operation. These documents will be submitted within 30 days after receipt by Granite Rock.

Should any archaeological evidence be found during operations, activities that would disturb the evidence would be halted. The District Ranger would be notified of the finding and an archaeological survey requested.

7. SETTLING PONDS
No settlement ponds are proposed for this operation.

8. PLANT SET-UP
No plant is proposed in 1981. A portable 16" x 24" jaw crusher/screening plant will be set up in 1982. Prior to setting up the jaw crusher/screening plant a written notice will be sent to the District Ranger. Disposal material from the plant will be placed in the designated disposal site.

9. SURFACE DISTURBANCE AND TIMING
The initial phase of operation covered by this document encompasses a surface impact area of seven acres. This includes roads, water lines, overburden disposal and open quarry site (Map 1). The time frame is between the 1981 and 1986 field seasons.

Implementation of the second phase of operation will depend upon the evaluation of this initial phase. Prior to movement into the second phase, a new Plan of Operation will be submitted identifying proposed roads, areas of disturbance, and time frames.

10. EQUIPMENT
The following equipment is presently in use at this operation; Cat D6; Kobelco su 60; Ingersoll Rand 4½" Crawler-Driller Rig; Eight yard dump truck; ten yard dump truck; Cat 977 front end loader; Gallion road grader; Pioneer Jaw 16" x 24".

11. Present operations include a field supervisor with four full time employees.

EXHIBIT C

LOS PADRES NATIONAL FOREST
ENVIRONMENTAL ASSESSMENT

File: 1950
Date: August 28, 1980
Project Name: Pico Blanco
Proponent: Granite Rock Company
County: Monterey
Location: Sec. (S) 1 T. 19S R. 1E MDM
Ranger District: Monterey
Proposed Starting Date: May 1981
Proposed Ending Date: 1986
Management Zone or Unit: Big Sur
Unit (Acres, Miles . . .) or National Forest: 7 acres

INTRODUCTION:

A. PROJECT BACKGROUND:

The mining laws of the United States confer a statutory right to any individual, partnership, corporation, association or other legal entity to enter public lands to locate and develop a mineral resource.

The Secretary of the Interior is delegated by law the responsibility to manage the mineral resources of National Forest System (NFS) lands. The Secretary of the Agriculture maintains authority to manage the surface resources on these lands.

On August 23, 1974, the Department of Agriculture adopted regulations to govern the use of the surface resources by persons operating under the Mining Law of 1872. These regulations allow for mining activities to be conducted, where feasible, so adverse environmental impacts to surface resources are minimized. The regulations do not prohibit activities which cause adverse environmental impacts as long as operators have, where feasible, minimized the impacts. Conformance to these regulations also insure that mining activities remain consistent with the Big Sur Coastal Unit Management Plan.

The Pico Blanco area has a large deposit of limestone. Potential markets for the ore include supplying limestone for the manufacture of cement, glass, pharmaceutical and chemical products.

Granite Rock Company has been exploring the extent and quality of the deposit on NFS lands and their own adjacent private land since 1962. The company has filed 16 placer plus 16 load claims in the area. Based on the economic report prepared by Whisler-Patri in 1976, Granite Rock Company has chosen to develop that portion of the deposit containing limestone of pharmaceutical and chemical grades.

The development of the deposit will be in two phases. The first phase will encompass the next 3 to 5 years. During this period, full scale production will entail the removal of ore at a rate of 15,000 to 32,000 tons per year. During the annual eight month operating season, truck traffic will be four to eight 25 ton loads per day. The existing road system on NFS land is sufficient to accomplish this phase. At the conclusion of this phase, approximately seven acres of surface resources will have been impacted by mining activities—five acres to the actual quarry, one acre to the road system and one acre to overburden disposal. During this initial phase, Granite Rock will be determining the economic feasibility for continuing operations at this quarry.



If the quality of ore is competively acceptable, then operations will move into a second phase that will encompass 25 to 45 years. At the conclusion of this second period, the quarry will encompass approximately 20 acres. Presently Granite Rock is evaluating several methods of operations. Before moving into the second phase, a revision to the current plan of operation will be required.

B. *DECISION TO BE MADE*

Whether to concur with Granite Rock Company's Plan of Operation, as submitted, for the exploration and economic feasibility of mining chemical grade limestone from the Pico Blanco site.

C. *PURPOSE AND NEED*

Granite Rock Company submitted a Plan of Operation on August 28, 1980, for the removal of limestone on Pico Blanco. This EAR has been prepared in response to that Plan of Operation.

D. *IDENTIFICATION OF ISSUES AND CONCERNS*

- Minimize adverse environmental impacts to surface resources while providing for the continuation of mining activities (36 CFR 252).
- Identify Cultural Resources in the area (FSM 2360).
- Retain optimum visual quality attainable during and after mining activities (Public comments).

II. DECISION CRITERIA

- Proposed alternative must provide for the continuation of mining activities in a prudent reasonable manner (36 CFR 252).
- Proposed alternative must provide for operations minimizing adverse environmental impacts where feasible on the following surface resources (36 CFR 252):
  a. Air Quality.
  b. Water Quality.

c. Soil Stability.

d. Fisheries and Wildlife Habitat.

e. Cultural Resources Habitat.

- Proposed alternative should provide for operations which minimize environmental impacts on visual quality (36 CFR 252).

III. ALTERNATIVES

A. *ALTERNATIVE GENERATION*

The alternatives generated are constrained by those regulations which govern the use of the surface resources on National Forest System lands. The Interdisciplinary Team was not able to identify any alternatives which are not governed by these regulations.

B. *ALTERNATIVES ELIMINATED FROM FURTHER CONSIDERATION*

The "No-Action" alternative has been eliminated from further consideration. Under CFR 252.5 the District Ranger has 30 days in which to respond to a Plan of Operation which has been submitted. CFR 252.5 does not give the District Ranger the opportunity to ignore a submitted Plan of Operation. Thus the "No Action" alternative is not viable.

C. *ALTERNATIVES*

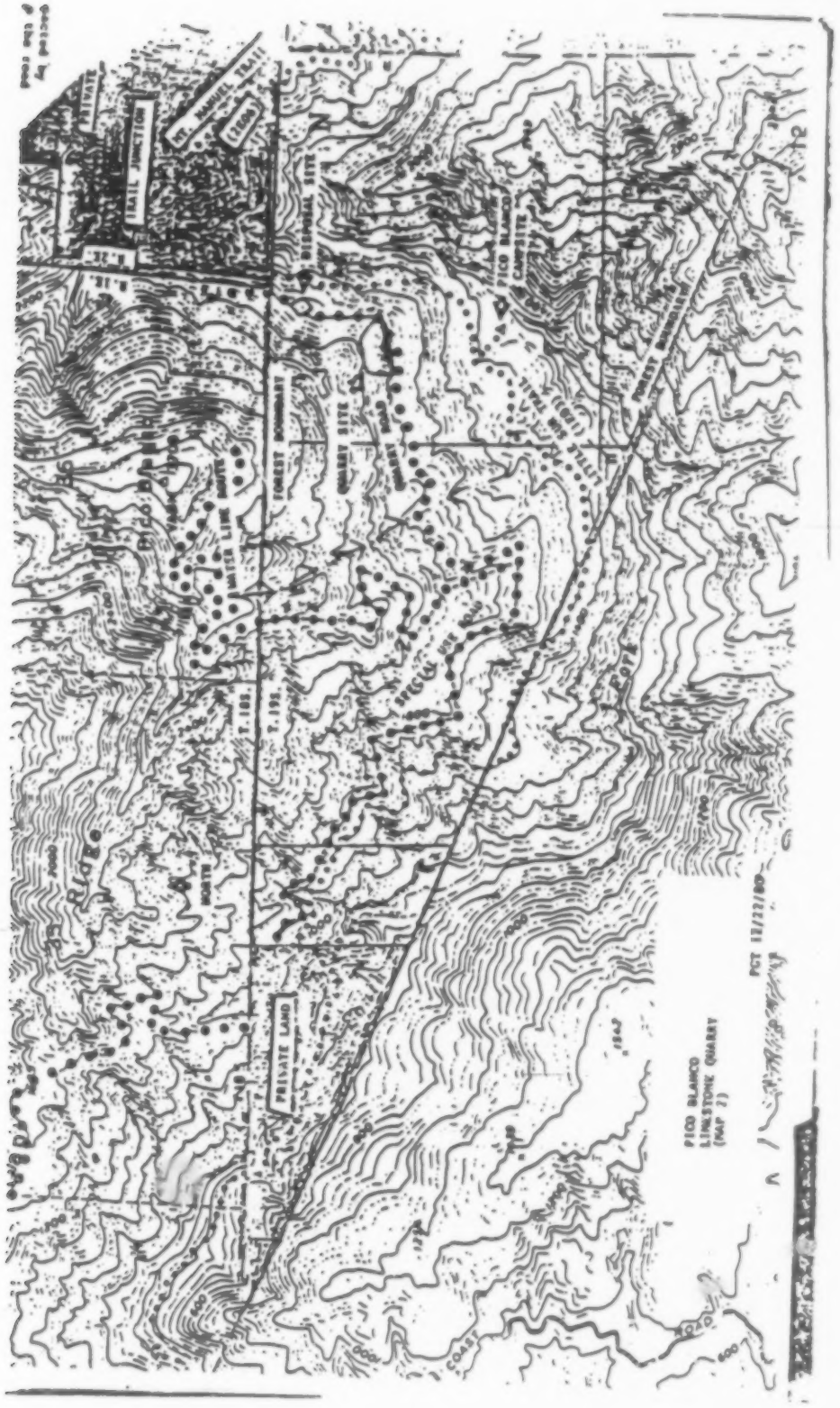
Alternative 1—Accept Granite Rock's Plan of Operation as submitted (Appendix 1). The operations identified in this plan consist of exploratory open pit mining of limestone. After surface material is removed, the ore body will be fractured by explosives. Highway type dump trucks will be used to haul limestone to an off-site crushing plant. Water will be sprayed on the roads to reduce dust. Overburden and spoils would continue to be deposited in sheltered ravines (as previously instructed) to reduce visual impacts. Surface disturbance area is identified as two acres. A time frame for initial development has not been identified. Rehabilitation will encompass screen planting with native shrubs. The mining face will be left with a sculptured look to emulate natural rock outcrops.

Alternative 2—Accept Granite Rock's Plan of Operation with modifications. The Plan of Operation would be modified to more specifically identify time frames, areas of impact, monitoring requirements and mitigation measures as discussed with the operator after the Plan of Operation was submitted.

The initial phase of operation covered by this document encompasses a surface impact area of seven acres. This includes roads, water lines, overburden disposal and open quarry site (Map 2). The time frame is between the 1981 and 1986 field seasons.

Operation under this alternative will require the removal of overburden to new disposal and storage site as designated on Map 2. The disposal site will be approximately 40′ x 150′ x 150′ in size. As work proceeds, the disposal site will be landscaped to duplicate existing land forms. Vegetation which predominates in the area will be planted on the site for slope stabilization and visual mitigation.

When spoils materials at the disposal site reach the elevation of the exiting road, the site will be used for temporary storage of overburden. The stored overburden will eventually be placed against the mine face after excavation activities are completed. This will help mitigate contrasting color shades between the mine face and surrounding slopes. Side cast overburden will be mulched with straw and seeded with adapted grasses. The Forest Service will specify the exact grass and species to be planted by the operator.



Water lines from company lands will be laid on the ground in sheltered ravines and along the road edge. Water will be used for dust abatement along the haul road. At the completion of the project, water lines will be removed from the site.

The Forest Service will prepare a road maintenance plan for Granite Rock Company by March 15, 1981. Granite Rock will be responsible for maintaining the road per specifications and maintenance levels identified in the plan. The maintenance plan will apply to the haul road between the quarry and the Forest Service Special Use Road. At conclusion of mining operations, Granite Rock will waterbar roads, seed with acceptable grass species, and generally restore the impacted area to standards set by USDA Forest Service.

The District Ranger will annually provide to Granite Rock an approved Fire Prevention Plan by April 15. Granite Rock will have 30 days from receipt of the plan to implement its provisions.

During blasting operations, Pico Blanco Camp and the Little Sur Trail (11S03) will be closed by the operator at least one-half hour prior to the scheduled blast time, ¼ mile above and below the blast site and certify in writing that no one is in the area. Upon conclusion of the blasting operation, the trail and camp will be reopened for public use after a representative of Granite Rock has walked the area and certified in writing that no hazards exist.

The Environmental Protection Agency (EPA) is the federal authority responsible for establishing and enforcing air and water quality standards. This authority has been redelegated to State and Local agencies. The Monterey Bay Unified Air Pollution Control District (APCD) is responsible for air quality standards in Monterey County. The responsible agency for water quality standards is the California State Water Quality Control Board.

Activities on NFS land which may effect these environmental components must be in compliance with the standards set by these agencies. Copies of orders, monitoring requirements and attainment targets established by either the local APCD or the State Water Quality Control Board for Granite Rock Company must be submitted to the District Ranger by Granite Rock Company within thirty (30) days.

Granite Rock is responsible for obtaining any necessary permits which may be required by the California Coastal Commission.

At the present time there is no known archaeological evidence within the project site. If evidence is found during operations, activities which would cause disturbance to the evidence would be halted and the District Ranger notified immediately.

IV. AFFECTED ENVIRONMENT

Pico Blanco is a limestone capped peak whose base divides the Little Sur drainage. From the foot of Dani Ridge, the South Fork of the Little Sur River circles around the southern base of Pico Blanco. The north half of Pico Blanco is encircled by the main fork of the Little Sur River. Launtz Ridge separates the two drainages on the east side of Pico Blanco.

The crossing of the Little Sur River on Highway 1 provides the public the best viewpoint of Pico Blanco from Highway 1 (photo 1). Here the peak and the steep west face of a north running ridge dominates the background. The upper portions of north-westerly running Dani Ridge are also seen from this vicinity.

[Photo 1 omitted in printing]

PHOTO 1: Pico Blanco from the Little Sur River

Other locations on Highway 1 afford the observer views of Pico Blanco. Approximately 2.5 miles south of the Little Sur River, the upper 200′ of the peak can be seen (Photo 2). Another location is 3.1 miles south of the Little Sur. Here the upper 600′ of the main peak can be seen (Photo 3). An access road on private property can be seen below the peak. The last two points are from the mouth of Swiss Canyon, and 5.3 miles south of the Little Sur bridge. Views from these two points are similar to the other observation points.

[Photo 2 omitted in printing]

PHOTO 2: Pico Blanco 2.5 miles South of Little Sur River

[Photo 3 omitted in printing]

PHOTO 3: Pico Blanco 3.1 miles South of the Little Sur River

Hikers on Molera Ridge are able to see the entire south and southwest faces of Pico Blanco. These hiking areas currently receive light visitor use.

The Little Sur Trail (1E03), brings the public closest to the proposed operations. Approximately 300 feet west of Pico Blanco Camp the trail crosses an open grassland. Hikers traveling east can see the edge of the quarry when looking upslope (Photo 4). Hikers travelling west must turn and look back to see the site. Travel time across the open area is approximately 4 minutes. Here the factors of vegetation, slope and aspect reduce visibility of the excavation to glimpses of side cast over burden. Visibility from Pico Blanco Camp is limited to side cast material seen through a dense tree stand. The approximate use of this area is 7 visitor days per week.

[Photo 4 omitted in printing]

PHOTO 4: Granite Rock Co. Quarry from the Little Sur Trail

The Mt. Manuel Trail (2E06) from its junction with the Little Sur Trail, traverses southeast along Launtz Ridge under a mixed hardwood overstory. Portions of the project area are intermittently visible through the vegetation along this portion of the trail (Photo 5).

[Photo 5 omitted in printing]

PHOTO 5: Granite Rock Project Area from the Mt. Manuel Trail

Vegetation on the project site is predominated by annual grasses growing among the rock outcrops. California Laurel *(Umbellularia californica)* and scrub oak *(Quercus dumoso)* are lightly scattered throughout the area.

Operations are currently 1000′ to 1500′ elevation above sea level on a 55% slope from the closest point on the South Fork of the Little Sur River. The greatest potential for point pollution is approximately 2000′ from the river on an average slope of 48%.

The Ventana Wilderness boundary is 0.5 miles east of the quarry site. Air quality standards for areas within the wilderness are Class I. The air quality standard for the proposed work site is Class II.

An archaeological survey of the project site indicates that there are no known cultural resources within the project area during this phase. Ethnologically there appears to be no genuine evidence that Pico Blanco was sacred to tribes in the area. Appendix 2 provides a more detailed report on the archaeological and ethnological background of Pico Blanco.

V. EFFECTS OF IMPLEMENTATION

A. *Effects Common to Both Alternatives*

Physical changes and operations on the project site will not be visible from view points along Highway 1. This results in no change in visual quality from these view points.

As the quarry is developed a bright horizontal open mine face will be visible from viewpoints along Molera Ridge. Towards the end of operations, hikers on Launtz Ridge will intermittently see the edge of the mine face. Views from Launtz Ridge will decrease as vegetation recovers from the Marble-Cone Fire.

Hikers traveling east along the Little Sur Trail will be able to see increasing portions of the mine face as excavation progresses.

Existing slopes and screening vegetation should limit views to the upper half of the mine face.

B. *Effects Specific to Individual Alternatives*

Alternative 1 would continue disposal of overburden into sheltered drainages. This deposition, containing some fine soil particles, could reduce percolation rate and increase siltation in the Little Sur River. Continued dumping of spoils materials could possibly be detrimental to existing overstory vegetation because of reduced soil aeration and root vigor.

The mine's open face would be left with a sculptured look. Natural weathering process will reduce the contrasting colors of excavated sites within 5 to 10 years. Planted vegetation along the road edge will screen the site disturbance from the Little Sur and Mt. Manuel Trails.

Alternative 2 calls for a disposal site approximately 100′ west of the Little Sur Trail. After restoration, the spoils deposit would become a grass covered slope and would rise approximately 40′ above the existing topography.

Overburden placed against portions of the open mine face will reduce contrast with the adjacent slopes. The planting of vegetative screening will aid in restoring the visual quality of the disturbed site. It will further reduce contrasting shades remaining after earlier mitigation measures. Visual mitigation measures will be observable in one to two years from Launtz Ridge, Molera Ridge and the Little Sur and Mt. Manuel Trails.

VI. EVALUATION OF ALTERNATIVES

A. *ALTERNATIVE MUST PROVIDE FOR THE CONTINUATION OF MINING ACTIVITIES.*

Both alternatives are consistent with this direction.

B. *PROPOSED ALTERNATIVES MUST PROVIDE FOR OPERATIONS MINIMIZING ADVERSE ENVIRONMENTAL IMPACTS WHERE FEASIBLE ON:*

1. *Air Quality*—Operations under either alternative can equally meet requirements for maintaining existing air quality

standards set by the Monterey County Air Pollution Control Board.

2. *Water Quality*—Implementation of Alternative 1 would run a greater erosion risk from disposal sites than Alternative 2. Increased risk would result in stricter monitoring requirements for disposal sites in Alternative 1 than those proposed for Alternative 2.

3. *Soils*—Alternative 1 would utilize a portion of the top soil to cover overburden placed in the drainages. Most of the top soil would not be fully utilized.

Alternative 2 would utilize reserved top soil to landscape the designated disposal site and the mine face.

4. *Fisheries and Wildlife Habitat*—There will be no significant change in the amount of quality habitat available to wildlife under either alternative.

Erosion potential from disposal sites is greatest under Alternative 1. This would increase probability of spawning habitat degragation for fresh water anadromous fisheries.

5. *Cultural Resources*—There are no known physical historical or cultural resources which would be impacted by either alternative on the project site. Alternative 2 provides for potential site protection.

C. *PROPOSED ALTERNATIVE SHOULD MEET THE VISUAL QUALITY OBJECTIVE FOR THE SITE:*

Alternative 1 mitigates impacts relating to physical form of the Site but not the contrasting shades. Natural weathering processes would require 5 to 10 years. This alternative would reduce site rating from Modification to Unacceptable Modification.

Alternative 2 mitigates impacts relating to physical form and contrasting shades within the first year of rehabilitation. This meets the criteria for meeting the Modification standards.

D. *EVALUATION SUMMARY*

	Alternatives	
	Alternative 1	Alternative 2
DECISION CRITERIA		
Alternative must provide for the continuation of mining activities.		
Proposed alternative must provide for operations minimizing adverse environmental impacts where feasible on:		
Air Quality		
Water Quality		
Soils		
Fisheries & Wildlife		
Cultural Resources		
Proposed alternative should meet the VQO for the site.		
Fully meets criteria		
Substantially meets criteria		
Partially meets criteria		
Does little to meet criteria		
Fails to meet criteria		

[Circles omitted in printing]

VII. CONSULTATION WITH THE PUBLIC AND OTHER AGENCIES

Vern Jones—California Regional Water Quality Control Board.

Mr. Jones' input is summarized in a letter to Granite Rock (Appendix *5*).

Donald Pine—California Department of Fish and Game.

Mr. Pine was contacted to ascertain if activities in the area would effect any threatened or endangered wildlife species. He indicated that activities would have no significant impacts on Peregrine or Praine Falcons.

VIII. CONSULTATION WITH FOREST RESOURCE SPECIALIST OTHER THAN I.D. TEAM

Hollis Record—Los Padres Forest Geologist
Robert Blecker—Los Padres Forest Hydrologist
Dennis Holcomb—Los Padres Forest Landscape Architect
Trini Juarez—Los Padres Landscape Architect
Dick Violet—Monterey District Wilderness Manager
Juan Lopez—Monterey District Fuel Management Foreman
Gary Mangus—Monterey District Fire Management Officer
Richard Zechentmayer—Monterey District Planner
Gene Onken—Monterey District Resource Officer

IX. I.D. TEAM PREFERRED ALTERNATIVE AND THE RATIONALE FOR PREFERENCE

Alternative 2 more clearly defines areas of impact, time frames and mitigation measures than Alternative 1. This difference makes Alternative 2 the preferred alternative.

X. IDENTIFICATION OF I.D. TEAM AND AUTHOR OF E.A.

Lester Sinclair—Los Padres Forest Landscape Architect
Ginny Grove—Los Padres Forest Geologist
Joan Brandoff—Monterey District Archaeologist
Paul Thomas (Author)—Monterey District Range Technician

XI. DISTRICT RANGER SIGNATURE AND RECOMMENDATION:

/s/ R. D. ZECHENTMAYER
For Robert E. Breazeale

Recommendation:

I concur with I.D. Team Preferred Alternative. Alternative 2 defines, clearly, impacts and their mitigation.

XII

DECISION NOTICE AND FINDING OF NO SIGNIFICANT IMPACT

Decision and Rationale:

The Granite Rock Company Plan of Operation is accepted with modification as developed in Alternative 2. The Modified Plan of Operation is as shown in Appendix F.

The claimant, in exercising his rights granted by the Mining Law of 1872, shall comply with the regulations of the Departments of Agriculture and Interior. The claimant is further responsible for obtaining any necessary permits required by State and/or county laws, regulations and/or ordinance.

The analysis of the proposed action will not have a significant effect on the human environment for which an environmental impact statement will not be prepared.

Line Officer /s/ Richard D. Zechentmayer
Date February 26, 1981
Title Acting District Ranger

Decisions of the Forest Officer are subject to review within a 30- or 45-day time limit pursuant to 36 CFR 211.19 by filing a written request for such review and a statement of reasons why you believe the decision is in error.

XIII. PARTIAL CHECKLIST OF COMMONLY AFFECTED ENVIRONMENTAL FACTORS

Insert digit which describes depth of evaluation for each item as follows:

1	Discussed in EA
2	Considered—no discussion needed (not affected by proposal)
3	Not applicable to proposal (not present in project area)

A. *Physcial Environment*

1	Geology and minerals
1	Soils
1	Climate and Air Quality
1	Water Quality and Quantity

B. *Biological Environment*

2	Sensitive plant species (FSM 2633.4 R5 Suppl. No. 33, dated 2/78, FSM 2670)
1	Other vegetation
2	Threatened, endangered, rare, or sensitive Wildlife species (FSM 2670)
2	Other wildlife

C. *Cultural Environment*

1	Archaeological and Historical Resources (FSM 2363.21 through 2363.22)
3	Scientific Resource (unique resources primarily of scientific value not otherwise considered)

D. *Socio-Economic Environment*

1	Wilderness and Unroaded Resource
1	Recreation Resource
1	Land Ownership
1	Transportation
1	Effects on National Forest Administration and Management
3	Energy Use and Conservation

E. *Secondary Socio-Economic and Growth Effects*

3	Changes in population distribution
2	Changes in levels or types of employment
3	Changes in land use patterns, such as private land development
3	Need for increased public facilities (utilities, sewage, roads, etc.)
2	Contribution to regional economic stability or rural area development
3	Changes in lifestyle
3	Effects which accrue differentially to minority or socio-economic groups

F. *Human Health and Welfare*

2	Seismic
1	Landslide
3	Avalanche
1	Fire Hazard
3	Flood Hazard
1	Other natural and man-made hazards and safety factors
2	Noise
1	Maintenance and enhancement of visual resource
2	Significance to man of changes in educational, cultural, and recreation opportunities
2	Value to nonuser and to society of retention of open space, wilderness, and related resources ("safety valve effect")
2	Any potential threat to human health which may result from sewage or solid waste disposal or pesticide use, etc., may be discussed here also

G. *Other*

3	Consistent with RARE II Policy
1	Consistent with California Coastal Act
1	Consistent with the Big Sur Coastal Planning Unit
1	Consistent with State Scenic Highway Viewshed

XV. EFFECTS TO BE CONSIDERED

1	Relation between local, short-term, long-term maintenance and enhancement of the environment
1	Any unavoidable adverse effects
2	Any irreversible or irretrievable commitment of resources
3	Minority groups, women, and civil rights
3	Prime farmland, range, and forest land
1	Wetlands and floodplains
1	Direct and indirect effects and their significance
2	Conflicts between other government agencies' land use plans, controls, and policies
3	Energy requirements and conservation measures
2	Depletable resource requirements and conservation
1	Historic and cultural resources
2	Threatened and endangered species

[Remainder of Exhibit C omitted in printing]

United States District Court
Northern District of California

[Caption omitted in printing]

[Filed March 30, 1984]

DECLARATION OF SAUNDERS C. HILLYER

I, Saunders C. Hillyer, declare and state as follows:

1. I am the Director of the Pico Blanco Project for the Big Sur Foundation, a non-profit organization with offices in Monterey, California.

2. I am familiar with the location and extent of Granite Rock Company's limestone mining on Pico Blanco, from review of Granite Rock's 1981-86 Plan of Operations and the U.S. Forest Service's Environmental Assessment Report, which depicts the location of the mining, and from viewing of and visits to the limestone mining site.

3. On February 6, 1984, I was flown in an airplane over Granite Rock's Pico Blanco mining site. I was accompanied by Peter Figen, a photographer, who at my direction took 35 millimeter color slide photographs of the mining site, ancillary mining roads, and surrounding terrain.

4. These photographs were subsequently developed into color slides, from which some 8 by 10 inch color prints were made. These color prints are attached to this declaration as Exhibits A through F.

5. Exhibits A through F accurately depict the geographic features of the mining site and ancillary mining roads, and they are true and correct representations of that which I observed during the airplane flight on February 6, 1984.

6. Exhibit G to this declaration is a portion of U.S. Geologic Survey quad sheets for the Big Sur Area, on which are depicted the location of Granite Rock's limestone quarry and mining roads as I viewed them, and as they are shown in Exhibits A through E.

7. Exhibit A shows Pico Blanco Mountain as viewed from above Molera Ridge in Molera State Park. The brown line cutting across the lower third of Pico Blanco is a portion of Granite Rock's mining road which is depicted on Exhibit G. Granite Rock's limestone quarry site is hidden from view in this photograph, and is located behind the far right corner of Pico Blanco as it is shown on Exhibit A.

8. Exhibit B also shows Pico Blanco Mountain as viewed from above Molera Ridge. Exhibit B shows part of the backside of Pico Blanco that was hidden from view in Exhibit A. The brown line cutting across Pico Blanco is a continuation of the mining road also shown in Exhibit A. The white area on Pico Blanco to the upper and middle portion of Exhibit B is Granite Rock's limestone quarry, the location of which is depicted on Exhibit G. The South Fork of the Little Sur River flows through the green vegetated valley at the base of Pico Blanco in roughly the center of Exhibit B. The area behind Pico Blanco and in the background of Exhibit B, is the Ventana Wilderness Area.

9. Exhibit C shows a closer view of Granite Rock's limestone quarry. Granite Rock's mining road leads up to the quarry, and continues on past the quarry, as shown on the right hand side of Exhibit C, to a disposal site. The quarry and the scarring of Pico Blanco left by the quarry can be seen from public viewing points in Molera State Park and the Los Padres National Forest, including the Ventana Wilderness Area.

10. Exhibit D shows a further view of the quarry, which is the larger whitish-brown area in roughly the center of the photograph. Exhibit D also shows the continuation of the mining road past the quarry, at the lower right-hand side of the photograph, which road eventually leads to the disposal site.

11. Exhibit E shows a further view of the mining road as it leads up to Granite Rock's quarry. The scarring caused by the mining road can be seen from public viewing points in Molera State Park. The South Fork of the Little Sur River is located in the green vegetated valley at the left side of Exhibit E. In the distance, at the top left-hand side of Exhibit E, is the Pacific Ocean north of Point Sur.

12. Exhibit F is another photograph of Granite Rock's mining road as it leads to the quarry. The South Fork of the Little Sur River is located in the green vegetated valley to the right-hand side of Exhibit F. While Exhibit E was photographed facing the Pacific Ocean, Exhibit F was photographed facing the Ventana Wilderness Area, which is in the background of Exhibit F.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco on March 23, 1984.

/s/ SAUNDERS C. HILLYER
Saunders C. Hillyer
Declarant

EXHIBIT A



EXHIBIT B



EXHIBIT C



EXHIBIT D



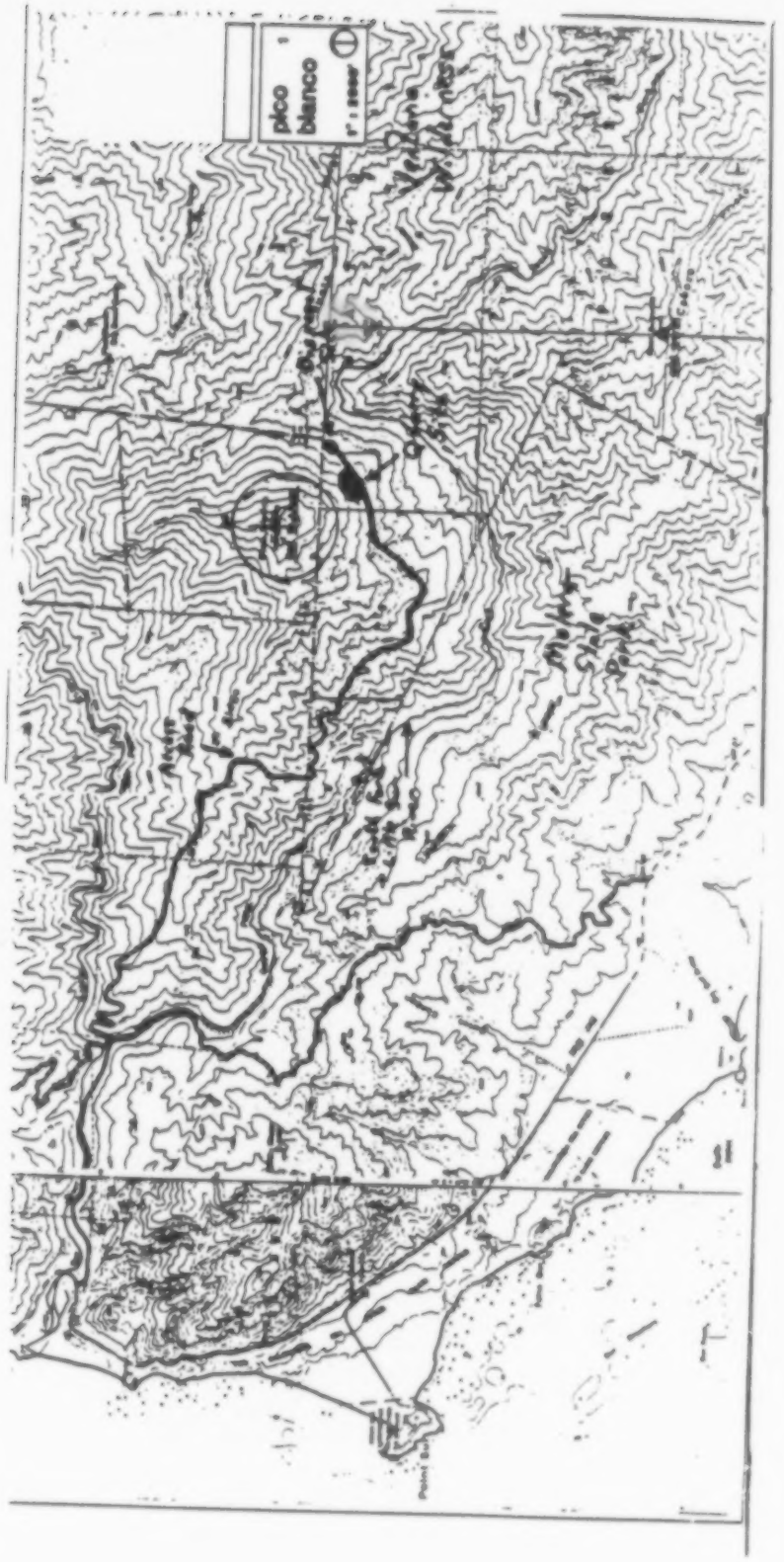
EXHIBIT E



EXHIBIT F



EXHIBIT G



United States District Court
Northern District of California

[Caption omitted in printing]

[Filed March 30, 1984]

DECLARATION OF LINUS MASOUREDIS

I, Linus Masouredis, declare and state as follows:

1. I am a deputy attorney general in the San Francisco office of the California Attorney General and am one of the counsel for defendants in this case.

2. On January 20, 1984, I arranged service of a set of interrogatories on plaintiff, Granite Rock Company.

3. Attached hereto as Exhibit A is a true and correct copy of Granite Rock's answers to these interrogatories.

4. Attached hereto as Exhibit B are true and correct copies of Granite Rock's invoices for the sale of Pico Blanco limestone, which Granite rock supplied with its interrogatory answers.

5. Attached hereto as Exhibit C are true and correct copies of Granite Rock's Proofs of Labor Upon Mining Claims, which Granite Rock supplied with its interrogatory answers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California on March 29, 1984.

/s/ LINUS MASOUREDIS
Linus Masouredis
Declarant

EXHIBIT A

In The United States District Court
Northern District of California

[Caption omitted in printing]

PLAINTIFF'S ANSWERS TO DEFENDANTS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR ADMISSIONS

Propounding Parties: California Coastal Commission, et al.

Responding Party: Granite Rock Company

Plaintiff above named answers the interrogatories propounded by defendants as follows:

1. Describe the mining operations that you have conducted or are conducting on the subject property, and describe with reference to a map, plat, metes and bounds description, assessor's map or parcel number, or other property description, where those mining operations have been or are being conducted.

ANSWER: Plaintiff has generally bored test holes, conducted core drilling, constructed roads and opened a small quarry. Specific tasks performed on the subject property are described in the Proof of Labor documents attached hereto as Exhibit "A".

The road locations are shown by the orange line on the map attached hereto as Exhibit "B". The existing quarry site is also shown in orange on the Exhibit "B".

2. Identify the years in which you have conducted mining operations on the subject property, and describe where the mining operations occurred in each year identified.

ANSWER: See attached Exhibit "A".

3. Identify and describe the minerals that you have mined or are mining on the subject property.

ANSWER: High-calcium whiting grade limestone.

4. For each year that you have identified in Interrogatory No. 2 above state:

A) The amount of each mineral removed;

B) The fair market value of the minerals removed;

C) The amount of each mineral sold;

D) The name and address of each person or company who purchased the minerals;

E) The gross proceeds received from the sale of the minerals.

ANSWER: 1959 to 1980: samples removed for analysis; none sold.

1981 to present: see Bills of Lading attached hereto as Exhibit "C" for amount removed and sold; see Invoices attached hereto as Exhibit "D" for name and address of purchaser and gross proceeds from sale.

5. For each year and mining location that you have identified in Interrogatory No. 2, state whether you contend that you have complied with the requirements set forth in 30 U.S.C. Section 28.

ANSWER: Yes.

6. For each year that you contend that you have complied with the requirements of 30 U.S.C. Section 28, describe the acts that you performed to comply with the requirements.

ANSWER: See attached Exhibit "A".

7. With respect to your allegation in paragraph XIII of the first cause of action in the amended complaint that "[p]laintiff Granite Rock Company has mining claims on a limestone deposit of national significance" please provide the following information:

A) State where the limestone deposit of national significance is located, by reference to a map, plat, metes and bounds description, survey, assessor's map or parcel number, or other property description;

B) Describe the nature, character and extent of the mining claims you have or claim to have, including a description

of the mining rights you claim as against the federal government, or any other unrelated private third party mining claimants;

C) Identify all persons to whom you have communicated your contention that you have mining claims on a limestone deposit of national significance, including any officials of the federal, state and local government, and describe the substance and circumstances of those communications;

D) Identify all documents relating to your answers to subparagraphs A) through C) above.

ANSWER:

A) See Exhibit "B".

B) Plaintiff has valid unpatented mining claims as shown on Exhibits "A" and "B", the nature and extent of which are set forth in the answer to Interrogatory No. 1 and defined by applicable federal law.

C) Plaintiff believes such communications have been made to Big Sur Citizens Advisory Committee; Monterey County Planning Commission; Monterey County Board of Supervisors; California State Division of Mines and Geology; California State Mining and Geology Board; U.S. Forest Service; U.S. Department of Agriculture; U.S. Bureau of Land Management; U.S. Department of Interior; local press.

D) Plaintiff is presently unaware of specific documents containing the communications described above. To the extent that the interrogatory requests Plaintiff to review voluminous company records to ascertain such records, it is objected to as unduly burdensome and oppressive.

8. With respect to your allegation in paragraph V of the first cause of action of the amended complaint that "[t]he value of Plaintiff's right to conduct its mining operation on unpatented mining claims, without interference by the California Coastal Commission, is in excess of the sum or value of $15,000" please provide the following:

A) State or estimate the dollar value of your mining operation on unpatented mining claims that is referred to in the paragraph, and describe how you computed or arrived at this dollar value figure or estimate;

B) Describe what type of "rights" you claim to have to conduct mining operations on unpatented mining claims, and state whether you contend those rights are vested or unvested, and against whom you have those rights;

C) Identify all documents upon which you rely or intend to rely to support your allegation that your right to conduct mining operations on unpatented mining claims is in excess of $15,000.

ANSWER:

A) Plaintiff has not yet retained experts or made the necessary studies to determine a current dollar value. However, Plaintiff has determined that its mining operation has tremendous value and is capable of providing a return of and on reasonably vested capital. See 8C below.

B) Plaintiff has valid unpatented mining claims. Plaintiff has vested rights to mine in accordance with applicable federal law.

C) Although Plaintiff does not intend to rely thereon, the State of California has estimated the value of the claims on the subject property to be in excess of $15,000 in its Classification Report. Copies of documents from which the substantial value of Plaintiff's valid unpatented mining claims is evident from the reports and correspondence attached hereto as Exhibit E, or referred to therein.

9. Do you contend that you presently have located on the subject property a "valuable mineral deposit" within the meaning of U.S.C. Section 22.

ANSWER: Yes.

10. If your answer to interrogatory 9 above is anything other than an unequivocal "yes" therein, then,

A) State each fact upon which you rely for your contention, or which indicates that you have not located a "valuable mineral deposit" within the meaning of 30 U.S.C. Section 22 on the subject property;

B) Identify all documents upon which you rely for your answer to interrogatory 9 and this interrogatory.

ANSWER: Not applicable.

11. For each year that you have conducted mining operations on the subject property, describe all "development," as that term is defined in Cal. Public Resources Code Section 30106, that you have performed on the subject property, including, but not limited to, road construction, grading, vegetation removal, and the construction of buildings, and describe the location where such development occurred.

ANSWER: See Exhibit A and answer to Interrogatory No. 1.

12. Have your mining operations on the subject property ever caused you to construct any roads, buildings, structures, improvements or carry out any grading, vegetation removal or other "development" within the meaning of Cal. Public Resources Code Section 30106 on other property, that is not federally owned and is off the subject property? If so, then please provide the following:

A) Describe what the particular development was;

B) Describe where the development occurred or where it was located with reference to a map, plat, assessor's map, survey or other property description;

C) Describe who owned the property on which the development occurred;

D) State the date the development occurred;

E) State how or why the development off the subject property was prompted or caused by your mining operations on the subject property.

ANSWER: Yes.

A) and B) See Exhibit "A" and answer to Interrogatory No. 1.

C) Hill Estate, Granite Rock and U.S. Forest Service.

D) See Exhibit "A" and answer to Interrogatory No. 1.

E) Access and other mining operations.

13. Identify and depict the specific location of the subject property on which your mining operations have been and are being conducted, by reference to a map, plat, USGS quad sheet, assessor's parcel map, survey of record or other property locational referent.

ANSWER: See Exhibits "A", "B" and "F" (Plan of Operation) attached hereto.

REQUEST FOR ADMISSION NO. 1: Admit that the subject property on which your mining operations are being conducted is physically located within the geographical boundaries of the "coastal zone" as that term is used in Cal. Public Resource Code Section 30103.

ANSWER: Yes, for the purposes of Plaintiff's Summary Judgment Motion, Plaintiff admits the subject property is within five miles of the mean high tide of the Pacific Ocean.

14. If your response to request for admission no. 1 above is anything other than an unqualified admission, then please provide the following:

A) State each fact which you contend supports your contention that the subject property is not physically located within the geographical boundaries of the "coastal zone";

B) State whether you contend that a) the subject property is not physically within the geographic boundaries of the coastal zone, or b) that it is physically within those geographic boundaries but that it is legally excluded from the definition of the coastal zone and the jurisdiction of the California Coastal Commission pursuant to 15 U.S.C. Section 1453(1).

ANSWER:

A) While it appears the subject property is within five miles of the shoreline according to the Coastal Commission maps, Plaintiff does not have adequate information to accurately answer this request. The information is probably in the records of the State of California and accessible to Defendants. Plaintiff is not aware that the "mean high tide" line west of the subject property has ever been accurately surveyed with relation to the subject property and described on a map. Plaintiff is not aware of any accurate survey of the land area and distances between the subject property and the coastline.

B) Plaintiff does not know if the subject property is "physically within" the geographic boundaries of the coastal zone. Answer to Interrogatory 14A above. Plaintiff believes it is legally excluded from the definition of the coastal zone and the jurisdiction of the California Coastal Commission. See admission to Interrogatory 20A, infra.

REQUEST FOR ADMISSION NO. 2: Admit that if the subject property is found by the Court not to fall within the exclusion in 16 U.S.C. Section 1453(1) which provides that "[e]xcluded from the coastal zone are land the use of which is by law subject solely to the discretion of which is held in trust by the Federal Government, its officers agents", that the subject property will then be within the coastal zone as that term is used in Cal. Public Resources Code Section 30103.

ANSWER: No. See answer to Admission No. 1 and answer to Interrogatory No. 20A, infra.

REQUEST FOR ADMISSION NO. 3: Admit that the subject property on which your mining operations are being conducted is physically located within five miles of the mean high tide line of the Pacific Ocean.

ANSWER: See answer to Interrogatory No. :

15. If your responses to request for admission nos. 2 and 3 are anything other than unqualified admissions, then;

A) State each fact which you contend supports your contention that the subject property would not be within the coastal zone even if the exclusion in 16 U.S.C. Section 1453(1) does not apply;

B) State how far or approximately how far the subject property is from the mean high tide line of the Pacific Ocean;

C) Identify all documents which support or which you rely on for your answer to subparagraphs A) and B) above.

ANSWER:

A) See answer to Interrogatories Nos. 14A and 20A.

B) Plaintiff does not have sufficient information or belief to answer this Interrogatory. See answer to Request for Admission No. 1 and Interrogatory No. 14A.

C) Not applicable. See Interrogatory 15B above.

16. Identify and describe all maps, surveys, aerial or other photographs, plats, diagrams, drawings or writings which depict or describe the location of the subject property and the mining operations thereon, or any "development" as that term is used in Cal. Public Resource Code Section 30106, which occurred on the subject property, or which occurred on other property but was caused by the mining operations on the subject property.

ANSWER: These locations are generally described on Exhibit "B" and in public records. Plaintiff objects to any further response insofar as the interrogatory mostly calls for public documents and beyond that is unduly burdensome and oppressive in relation to the relevance, if any, of such cumulative documentation.

17. Do you contend that the subject lands upon which your mining operations are being conducted, are "lands the use of which is by law subject solely to the discretion of the Federal Government, its officers or agents" within the meaning of 16 U.S.C. Section 1453(1)?

ANSWER: Yes.

18. If your answer to interrogatory no. 17 is anything other than an unqualified "no" then,

A) State each fact and contention upon which you base your answer to interrogatory no. 17;

B) State whether you have ever communicated to any person or governmental agency, or acknowledged that the subject property is subject to the sole discretion of the federal government, and if you have, then describe the substance and circumstances of such communication;

C) State whether you have ever communicated to any person or any governmental agency, or whether you have ever contended that the subject property is not subject to the sole discretion of the federal government, and if you have, then describe the substance and circumstances of such communication;

D) Identify all documents which support or upon which you rely for your answers to interrogatory 17, and this interrogatory and the subparagraphs thereof.

ANSWER:

A) Fee title to the subject property is held by the federal government. The subject property is under the jurisdiction of the U.S. Forest Service. Plaintiff holds valid unpatented mining claims thereon. The subject property is held in trust for the public by Congress subject to the United States Constitution and the amendments thereto.

B) None recalled at this time.

C) None recalled at this time.

D) See answer tc Interrogatory No. 1.

19. State each fact and contention supporting your allegation in paragraph XI of the first cause of action of your amended complaint that title to the subject property is held in trust by the federal government.

ANSWER: See answer to Interrogatory No. 18A.

20. Do you contend that the subject property on which you are conducting mining operations is excluded from the coastal zone pursuant to 16 U.S.C. section 1453(1) on any ground other than that the lands are held in trust by the federal government. If you do then,

A) State the basis for, and your contentions regarding such an exclusion;

B) Identify all documents upon which you rely for your answer to subparagraph A) above.

ANSWER: Yes.

A) See answers to Interrogatories 17, 18A, 19, 22 and 23. Further, Plaintiff is not certain that the subject property is within fives miles of mean high tide, nor does the subject property have a direct and significant impact on coastal waters, nor is it necessary to control shorelands. Further, the Supremacy Clause of the U.S. Constitution pre-empts any state regulation of federal lands, and, further, determination of "consistency", if any is needed, is subject to the ultimate and sole discretion of the federal government.

B) See answer to Interrogatory No. 1.

21. Do you contend that the United States would be required to pay you just compensation if the United States prohibited you from conducting further mining operations on the subject property? If your answer is anything other than an unqualified "no" then;

A) State the basis for your contention that the United States would be required to pay you just compensation if the United States prohibited you from conducting further mining operations on the subject property;

B) Describe the nature, character and extent of any property rights which you contend would be unconstitutionally taken if the United States prohibited you from conducting further mining operations on the subject property;

C) Describe how you acquired any such property rights that are described in your answer to subparagraph B) above;

D) Identify all documents which support or upon which you rely for your answer to this interrogatory and the subparagraphs thereof.

ANSWER: We object to this Interrogatory No. 21 on the basis that it calls for a legal conclusion unrelated to the facts or issues in this case, is based upon hypothetical facts and speculative assumptions, is irrelevant, and calls for disclosure of attorney's work product and mental processes formed in anticipation of unrelated litigation.

22. State whether you contend that the United States has no discretion to deny you a patent for the "unpatented mining claims" identifed in paragraph V and VI of your amended complaint.

ANSWER: In exercising its jurisdiction the federal government has discretion to weight evidence in granting patents. It has no discretion to deny mining by Plaintiff on the subject property so long as Plaintiff complies with applicable federal laws.

23. If you contend in your answer to interrogatory no. 22 above that the United States has discretion to deny you a patent, state the grounds on which the United States could deny your application for a patent for your mining claims.

ANSWER: Plaintiff's failure to comply with applicable federal law.

24. State whether you contend that the United States has no discretion to prohibit you from conducting mining operations on the subject property.

ANSWER: See answer to Interrogatory No. 22.

25. If you contend in your answer to interrogatory no. 24 above that the United States has discretion to prohibit you from conducting mining operations on the subject property, state the ground on which the United States could prohibit you from conducting the mining operations.

ANSWER: See answers to Interrogatories Nos. 22 and 23.

26. Have you ever obtained or applied for any patents from the United States to conduct mining operations on the subject property, and if so,

A) Identify the dates of any patents or patent applications and describe the substance of the patents or patent applications;

B) Describe the lands covered by the patents or patent applications;

C) Describe the disposition or status of any patent applications;

D) Identify all documents relating to your answers to this interrogatory or any subparagraph thereof.

ANSWER: No.

A) Not applicable.

B) Not applicable.

C) Not applicable.

D) Not applicable.

REQUEST FOR ADMISSION NO. 4.: Admit that the United States has unfettered and unrestricted discretion to terminate any ongoing mining operations you are presently conducting on the subject property without paying you any compensation.

ANSWER: No.

27. If your response to request for admission no. 4 is anything other than an unqualified admission, then,

A) State your contentions as to why the United States does not have unfettered and unrestricted discretion to terminate any of your ongoing mining operations;

B) State all facts which support your response to request for admission no. 4 and subparagraph A above;

C) Describe the restrictions and constraints which you contend would limit the ability of the United States to terminate your ongoing mining operations.

ANSWER:

A) See answers to Interrogatories 17, 18A, 19, 22 and 23.

B) See answer to interrogatory No. 1 and all applicable federal laws.

C) The United States Constitution, the Mining Act, applicable federal laws, and judicial precedent relating thereto.

28. State whether you contend that you have a vested right to conduct mining operations on the subject property, and if you so contend, describe the nature and extent of any and all vested rights you claim in the subject property.

ANSWER: Yes. See answer to Interrogatory No. 7B.

29. Do you contend that you have an equitable or legally protectible title interest in the subject property on which you are conducting mining operations?

ANSWER: Yes to both of the compound questions set forth therein.

30. If your answer to interrogatory no. 27 is anything other than an unqualified "no", then,

A) Describe the nature and extent of any equitable or legally protectible title interest that you contend you have in the subject property;

B) Describe how you acquired any equitable or other title interest in the subject property;

C) Identify all documents which you contend support your claim or an equitable or legally protectible title interest in the subject property.

ANSWER:

A) Plaintiff has valid unpatented mining claims. See answer to Interrogatory No. 18A above.

B) By compliance with applicable federal law.

C) See answer to Interrogatory No. 1.

31. Have you submitted any Plans of Operation to the United States Forest Service to conduct mining operations on the subject property, and if you have, please provide the following:

A) State when you submitted each Plan of Operation to the Forest Service;

B) State whether and when the Forest Service approved each Plan of Operation;

C) State the beginning and expiration dates for each Plan of Operation.

D) Describe the activities and the mining operations contained in each Plan of Operation, including a description of where such activities and operations were to be located geographically;

E) Describe the extent to which you have actually undertaken or completed the activities and mining operations described in each Plan of Operation, and state whether any activity or mining operation that is described in a current Plan of Operation has not been completed or undertaken to date;

F) Have you undertaken on the subject property any mining operation or "development" as that term is used in Public Resources Code Section 30106, that is not described in any Plan of Operation;

G) State whether you have previously submitted to the United States Forest Service any amendments to your current Plan of Operations, and if so, describe the substance of the amendments, the date they were submitted, and what action the Forest Service took on the amendments.

ANSWER:

A), B), C) and D) See Exhibit F.

E) See answer to Interrogatory No. 1.

F) See answer to Interrogatory No. 1.

G) No.

REQUEST FOR ADMISSION NO. 5.: Admit that you have carried out mining operations on the subject property after October 17, 1983.

ANSWER: Admitted.

32. If your answer to request for admission no. 5 is anything other than an unqualified admission, then;

A) State why you have not carried out any mining operations on the subject property since October 17, 1983;

B) State whether you intend to permanently cease conducting any future mining operations on the subject property;

C) Identify all documents which relate to or substantiate your answers to subparagraphs A) and B) above.

ANSWER:

A) Not applicable.

B) Not applicable.

C) Not applicable.

33. State whether or for how long you intend to conduct mining operations on the subject property.

ANSWER: As long as Plaintiff can mine an economically viable and valuable mining deposit under applicable federal laws.

34. Describe any plans, projections, estimates or forecasts that you have made regarding future mining operations on the subject property.

ANSWER: See Exhibit F. No further plan has yet been prepared by Plaintiff.

35. Describe any future "development", as defined in Public Resources Code Section 30106, in which you intend to engage on the subject property.

ANSWER: See answer to Interrogatory No. 34.

36. Have you entered into any contractual or other business commitments, or entered into any agreements, which contemplate or require that you continue mining operations past the

expiration date of your current Plan of Operations, and if so, please describe said commitments or agreements and indicate how or why they require or contemplate the continuation of mining operations.

ANSWER: Yes. Plaintiff's investments and activities regarding its valid and unpatented mining claims require continuing operation beyond the present Plan of Operations.

37. State whether you intend to submit a Plan of Operations to the United States Department of Forestry upon expiration of any current Plan of Operations.

ANSWER: Plaintiff has not formulated a specific plan or intention at this time. Plaintiff cannot predict what requirements may exist. Plaintiff intends to continue to comply with applicable federal laws and regulations to continue its mining operations.

38. State whether and when you intend to submit to the United States Department of Forestry amendments to any existing Plan of Operations.

ANSWER: See answer to Interrogatory No. 37.

39. State whether and when you intend to apply to the United States for a patent to the subject property, and if you do not intend to apply for a patent, please state the reasons for that.

ANSWER: Plaintiff does not know at this time. See answer to Interrogatory No. 37.

Dated: March 23, 1984

JESS S. JACKSON, P.C.

/s/
Attorneys for Plaintiff

[Remaining exhibits omitted in printing]

[Verification and proof of service omitted in printing]

LETTER FROM DEPARTMENT OF JUSTICE DATED AUGUST 10, 1976 (EXHIBIT A TO PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, FILED MAY 9, 1984 IN DISTRICT COURT)

[Letterhead]

Department of Justice
Washington D.C. 20530

August 10, 1976

Mr. William C. Brewer, Jr.
General Counsel
National Oceanic and Atmospheric Administration
Rockville, Maryland 20852

Mr. Brewer:

The Coastal Zone Management Act of 1972, 86 Stat. 1280, 16 U.S.C. §§ 1451-64 (Supp. IV, 1974) as amended by the Coastal Zone Management Act Amendments of 1976, Pub. L. 94-370 90 Stat. ____[1] (July 26, 1976) (the "Act") is designed to encourage the States to prepare and implement management programs, *i.e.*, planning and regulatory programs, with respect to their "coastal zones." Subject to the more detailed definition provided by the Act, a coastal zone may generally be considered as comprising coastal waters, the land thereunder and the adjacent shorelands. The incentives which the Act provides to the States for this purpose consist of federal grants to finance a portion of their costs in developing and administering management plans. S. Rep. No. 92-753, 92d Cong., 2d Sess. 2 (1972) ("Senate Report").

You have requested our opinion concerning which lands owned by the United States are subject to the state planning and regulatory process under the Act. The pertinent provision is found

[1] The 1976 Amendments made a number of significant changes in the Act, none of which are pertinent to the question considered herein.

in the last sentence of section 304(1) of the Act,[2] which excludes the federal lands from the definition of the Coastal Zone in the following terms:

> . . . Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

You have taken the position that the only federal lands excluded from this definition are those as to which the Federal Government has "exclusive legislative jurisdiction," relying primarily on the argument that "sole discretion as to use" is intended to be synonymous with "exclusive legislative jurisdiction." The Departments of Agriculture, Defense, Interior and Transportation are of the view that all federally-owned lands used by the Federal Government for federal purposes are excluded from the Coastal Zone regardless of the character of the Federal Government's jurisdiction over such lands.

In considering this question, it is useful to bear in mind the varying sorts of jurisdiction which the Federal Government may have over lands. In this respect, Federal lands fall into four separate categories:

1. *Lands over which the United States is empowered to exercise exclusive legislative jurisdiction.*

This type of jurisdiction derives from Article I, section 8, clause 17 of the Constitution which provides that Congress shall have power

> To exercise exclusive Legislation in all Cases whatsoever over such District . . . as may . . . become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the

[2] This section was redesignated section 304(1) by the 1976 Amendments. Pub. L. 94-370 § 1, 90 Stat. ____ (July 26, 1976). This new designation is used herein.

> Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings. . . .

Generally speaking, the States have no jurisdiction within the "Federal enclaves" described in this clause.[3]

2. *Lands over which the United States and a State exercise concurrent jurisdiction.*

These are lands within a State that have been acquired by the United States by the cession or with the consent of the State but with the State retaining certain jurisdiction and authority within the boundaries of the acquired land. In general, such reservation is permitted so long as it does "not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired . . . ."[4]

3. *Lands held by the United States as a proprietor.*

With respect to these lands, the State has not ceded any jurisdiction to the United States. The authority and power of the United States over these lands derives from Article IV, section 3, clause 2 of the Constitution which provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .

While some private activity on such lands is subject to the powers of the State,[5] the disposition and use made of such lands by the

[3] See, *e.g., Pacific Coast Dairy, Inc. v. Department of Agriculture of California*, 318 U.S. 285, *rehearing denied* 318 U.S. 801 (1943); *Bowen v. Johnston*, 306 U.S. 19 (1939) (no criminal jurisdiction); *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930) (no power to tax private property); *Arlington Hotel v. Fant*, 278 U.S. 439 (1929) (no power to legislate with respect to enclave).

[4] *James v. Dravo Contracting Co.*, 302 U.S. 134, 149 (1937) (land purchased with consent of the State); *accord, Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885) (land acquired by State cession).

[5] *James v. Dravo Contracting Co., supra* note 4.

United States has been repeatedly described as being without limitations.[6]

4. *Trust lands.*

Indian lands owned by the United States have been held to be owned in trust for Indian tribes or for individual Indians.[7]

The significance of the question of what federal lands are excluded from the Coastal Zone is made evident by the fact that about 95% of the land owned by the Federal Government is held in a proprietary capacity.[8] If all federal lands, other than those over which the United States has exclusive legislative jurisdiction or trust lands, are held to be included within the Coastal Zone, the States will gain a considerable degree of control over the uses of these lands pursuant to the so-called consistency requirements of section 307(c) of the Act, 16 U.S.C. § 1456(c) (Supp. IV, 1974). Pursuant to section 307(c)(1) of the Act, federal activities "directly affecting" the Coastal Zone must be conducted, to the maximum extent practicable, in a manner which is consistent with the State's approved management program. If all federal lands otherwise within the Coastal Zone except those subject to

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[6] *Kleppe v. New Mexico*, ____ U.S. ____, 96 Sup. Ct. 2285 (1976); *Alabama v. Texas*, 347 U.S. 272, 274 (1954) and cases quoted therein.

[7] *United States v. Chase*, 245 U.S. 89, 99-100 (1917) (in trust for tribe); *United States v. Bowling*, 256 U.S. 484, 487 (1921) (in trust for individual Indian).

Only the Department of Interior addresses separately the question of whether lands held in trust by the Federal Government are excluded from the Coastal Zone, asserting that they are. Since § 304(1) of the Act expressly provides that "lands held in trust by the Federal Government" are excluded from the definition of Coastal Zone, it appears that this view is correct. The legislative history discussed below confirms this view.

[8] U.S. Public Land Review Comm., *Federal Legislative Jurisdiction Study Report No. 1* 163-4 (1969). The Department of Agriculture advises that more than 90% of the national forests are held in proprietal status. Memorandum of the Department of Agriculture, Office of General Counsel to Chief, Forest Service, *Coastal Zone Management* 7. (Feb. 25, 1976).

federal exclusive legislative jurisdiction and trust lands are included within the Coastal Zone of the State in which such lands are situated, the State will have substantial authority over the uses made of all such lands without regard to whether the consequences of such use are confined to the federal lands or whether there is any spill-over to state lands. As noted in your submission, if the exclusionary provision is narrowly read, the consistency provisions would "assimilate a limited body of State law [the State's Coastal Zone management program] into Federal law for the purpose of governing the conduct of Federal agencies."[9]

To determine the Congressional intent with respect to the federal exclusion provision, one must first look at the plain words of the exclusionary provision in the statute, Section 304(1) of the Act provides:

> Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

It is your view that the extent of this exclusion is limited to those lands as to which the United States has "exclusive legislative jurisdiction" because with respect to concurrent jurisdiction lands or proprietary lands there remains the possibility of valid State action so long as such action is not inconsistent with Federal law.[10] However, this is not true with respect to the use made by the Federal Government of federal lands, such use not being subject to regulation by the States regardless of the scope of the Federal Government's jurisdiction within the boundaries of such land.[11] More importantly, this argument confuses discretion regarding the use of land (the statutory test for exclusion) with the

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[9] National Oceanic and Atmospheric Administration, Department of Commerce, Excluded Lands Paper 8 (1976).

[10] *Id.* at 6. See text at notes 4 and 5.

[11] Constitution, Art. VI, cl. 2, the "supremacy clause;" *id.* Art. IV, sec. 3, cl. 2; *Hunt v. United States*, 278 U.S. 96 (1928); *McKelvey v. United States*, 260 U.S. 353 (1922); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917); *Ohio v. Thomas*, 173 U.S. 276 (1899); *Camfield v. United States*, 167 U.S. 518 (1897); *Fort Leavenworth R.R.*

(Footnote continued on following page)

constitutionally derived power to exercise exclusive legislative jurisdiction within certain geographical boundaries. Legislative power is not synonymous with the power to utilize land. This distinction has been recognized by the Supreme Court in rejecting the contention that lands of the United States within a State when not used for a governmental purpose are subject to State power to the same extent as would be lands owned privately.

> True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, *to control their use* and to prescribe in what manner others may acquire rights in them. . . .
>
> And so we are of the opinion that the inclusion within a State of lands of the United States does not take from Congress the *power to control their occupancy and use*. . . .[12]

If full power to control the use of lands of the United States resides in Congress, such power must also be the sole power, for power is not full if subject to the actions of another. Thus, the plain language of the federal lands exclusion makes it clear that all federal lands are excluded from the Coastal Zone.

Even were the statutory language ambiguous, the same result would obtain for, as the Supreme Court has recently stated:

> Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of State regulation is found only where and to the extent there is "a clear congressional

Co. v. Lowe, supra note 4; *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

[12] *Utah Power & Light Co. v. United States, supra* at 404-405 (emphasis added). In *Kleppe v. New Mexico, supra* note 6, the Supreme Court recently reaffirmed the unlimited nature of Congress's power over public lands in the broadest terms.

> mandate," "specific congressional action" that makes this authorization of State regulation "clear and unambiguous."[13]

The conclusions reached by examining the other sources of legislative intent are in accord with the plain meaning of the statute. Section 307(e) of the Act, 16 U.S.C. § 1456(e) (Supp. IV, 1974) provides as follows:

> Nothing in this chapter shall be construed—
>
> (1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters; nor to displace, supersede, limit, or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects;
>
> (2) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies; nor to affect the jurisdiction, powers, or prerogatives of the International Joint Commission, United States and Canada, the Permanent Engineering Board, and the United States operating entity or entities established pursuant to the Columbia River Basin Treaty, signed at Washington, January 17, 1961, or the International Boundary and Water Commission, United States and Mexico.

This language is not consistent with the view that the Act was intended to work a virtual revolution in Federal-State relations by vesting the States with substantial authority over the use the

[13] *Hancock v. Train*, ___ U.S. ___, 96 Sup. Ct. 2006, 2013 (Federal installations not required to obtain State permits under Clean Air Act); *accord, Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, ___ U.S. ___, 96 Sup. Ct. 2022, 2028 (1976) (Federal installations not required to obtain State permits under Federal Water Pollution Control Act Amendments of 1972).

Federal Government makes of federal lands.[14] The Senate Report describes this provision, originally found in section 314(d) of the bill as first passed by the Senate, as "a standard clause disclaiming intent to diminish Federal or State authority in the fields affected by the Act." Senate Report at 20. The House Report states that there is nothing in the coordination provisions of the Act "which shall be construed to diminish either Federal or State jurisdiction, responsibility or rights in the field of planning, development or control of water resources or navigable waters." House Report 92-1049, 92d Cong. 2d Sess. 20 (1972). Such language hardly seems compatible with the suggestion that the Congress intended the Act to change the long established order with respect to the use and management of Federal lands.

Similarly, the legislative history of the exclusionary sentence itself indicates that all Federal lands were intended to be excluded. The Senate Report said of section 304(1);[15]

> The coastal zone is meant to include the non-Federal coastal waters and the non-Federal land beneath the coastal waters and the adjacent non-Federal shore lands including the waters therein and thereunder. Senate Report at 9.

The phrase "*non-Federal land*" implies that all federal lands are excluded from the Coastal Zone. The passage contains no hint of an intent to distinguish, for the purposes of this statute, between federal land subject to exclusive federal legislative jurisdiction and other federal lands. The Senate Report also states that the consistency requirements do not "extend State authority to land subject solely to the discretion of the Federal Government such as national parks, forests and wildlife refuges, Indian reservations and defense establishments." *Ibid.* Since only a small minority of

[14] As originally passed by the Senate, this section contained an additional subsection providing that the Act was not to be construed "to change or otherwise affect the authority or responsibility of any Federal official in the discharge of the duties of his office except as required to carry out the provisions of this title." § 314(d)(2), S. 3507, 118 Cong. Rec. 14190, 92d Cong. 2d Sess. (1972).

[15] Then designated section 304(a); see note 2, *supra*.

the national parks, forests and wildlife refuges[16] are subject to exclusive federal legislative jurisdiction, the use of those examples again indicates a Congressional intent to exclude all federal lands no matter in what manner they are held by the United States. To reach the contrary result one must argue, as you do, that this sentence should be read as referring only to those national parks, forests and wildlife refuges etc. which are subject to sole federal legislative jurisdiction. In our view, such an interpretation is strained, and it would render the clear implication of the passage to the average reader misleading.

The exclusionary language was absent from the bill as first passed in the House. The Conference Committee, however, included it with the following comment:

> The Conferees also adopted the Senate language in this section which *made it clear* that Federal lands are not included within a State's coastal zone. H.R. Rept. No. 92-1544, 92d Cong., 2d Sess., 12 (1972) (emphasis added).

This language indicates that it was the view of the conferees that federal lands were excluded from a State's Coastal Zone even in the absence of this explicit exclusionary provision and that the Senate language merely made the exclusion clear. But the subtle distinction between proprietary and nonproprietary federal lands could hardly be considered implicit in the bill before the exclusionary language was added. The Conference Committee Report provides additional support in its section explaining the decision to vest responsibility for the program in the Department of Commerce, as provided in the Senate version, rather than in Interior, as the House had provided. In connection with this discussion the conferees noted that "those lands traditionally managed by the Department of Interior or the Department of Defense, such as parks, wildlife refuges, military reservations, and other such areas covered by existing legislation, were specifically excluded from the coverage of the bill." *Id.* at 13.

Finally, it is worthwhile to examine the origin of the language of the federal exclusionary provision. It seems to have first

[16] See note 8, *supra*.

appeared as part of S. 3354, 91st Congress, a land use planning bill. Section 305(b)(1)(A) of that bill excluded from the State plan "lands the use of which is by law subject solely to the discretion of . . . the Federal Government . . . ." The Report of the Senate Committee on Interior and Insular Affairs noted with respect to this provision that

> *Federal lands* and the Federal trust-Indian lands *are excluded in order that the Federal Government's independence in the management of its lands will not be compromised.* The Committee acknowledges the need for improved Federal land use policies and practices . . . . but feels that the comprehensive substantive planning responsibilities of the Federal Government with respect to Federal lands should be considered separately from the present legislation . . . . Sen. Rept. No. 91-1435, 91st Cong. 2d Sess. 38-39 (emphasis added).

In short, the plain language of the statute appears to exclude all lands owned by the United States, since the United States has full power over the use of such lands and "sole discretion" with respect to such use. This conclusion is supported by the legislative history of the Act. Nowhere is there any suggestion that Congress intended to exclude some federal land from the Coastal Zone, and hence from State regulation, while including other such land within the Zone. We might add that the results of such an intent would be whimsical; as the submission of the Department of Defense notes, by way of example, part of the Naval base at Sewells Point in Norfolk is subject to exclusive federal legislative jurisdiction, part is subject to concurrent jurisdiction and part is held in a purely proprietary capacity.[17]

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[17] Department of Defense, *Position on Federal Lands Exclusion of the Coastal Zone Management Act* Appendix. (1976).

Accordingly, it is my opinion that the exclusionary clause excludes all lands owned by the United States from the definition of the Coastal Zone.

Sincerely,

ANTONIN SCALIA
Assistant Attorney General
Office of Legal Counsel

DECLARATION OF ROGER W. JEPPSON (EXHIBIT B TO PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, FILED MAY 9, 1984 IN DISTRICT COURT)

[Caption omitted in printing]

I, ROGER W. JEPPSON, declare and state as follows:

1. I am an attorney residing in the State of Nevada and licensed to practice law in the State of Oregon and the State of Nevada.

2. I graduated from Duke University Law School in 1961. Immediately thereafter I clerked for Justice Kenneth J. O'Connell of the Oregon Supreme Court, then commenced to practice law in Reno, Nevada in June, 1962. Since that time my practice has been primarily in the area of natural resources, specifically hard-rock mining including problems arising under the general mining law and the various statutes and regulations relating to western public lands.

Since 1962 I have undertaken the handling of patent applications under the general mining law on a regular basis. An examination of my records indicates that at no time since 1962 has there been a time in my practice when patent proceedings were not pending on behalf of some client.

Because of my specialty, I am frequently called upon to assist lawyers in states where I am not admitted to practice. For this reason my activities involving mining, mining claims and patenting procedures have encompassed generally the Western United States, including Alaska. In this connection representative clients for whom patenting procedures have been or are currently being handled are: Phillips Petroleum Company; United States Steel Corp.; Placer Amax, Inc.; Tenneco Minerals Company; Newmont Mining Company and Freeport Minerals, Inc.

3. In response to the contention of the California Coastal Commission that the unpatented claimants' right to patent is automatic, I hereby declare that such a right is contingent upon

the satisfaction of several requirements of the Mining Law of 1872 and the many rules and regulations promulgated thereunder. It is the necessary completion of these substantive and procedural contingencies which results in the patent application being in actuality a very complicated, time-consuming and expensive process.

4. It is my experience in handling mineral patent applications for a variety of clients in several different areas in the Western United States that the average length of time between the point at which the applicant decides to apply for patent and the point at which the patent is finally issued is between four (4) and five (5) years. This estimation considers the application of patent to lands with which there are no procedural or substantive problems and which are located in non-sensitive areas environmentally. If any problems arise regarding any of the matters recited hereafter, or if the land in question is located in what the Bureau of Land Management deems a sensitive area, whereby passage of legal title to the land is seen as contrary to the policies of the United States, the estimation of five (5) years will generally double or triple. In this regard, the case histories recited below depict such extremely long time periods.

5. The mineral patent application is preferably handled by a mining attorney knowledgeable in the substantive and procedural requirements of patenting, familiar with the operation of the Bureau of Land Management and able to represent the applicant in any contests or adverse proceedings. It has been my experience that the average cost required to obtain patent to a small (10-15) group of mining claims will vary between Twenty-five and Fifty Thousands Dollars ($25,000.00 and $50,000.00), exclusive of fees to the United States and costs incurred in economic and geological analyses. This figure will increase greatly if any adverse proceedings or contests are brought.

6. The steps required in obtaining a patent to mining claims can be summarized as follows:

(a) First, of course, the claim must have been validly located in the first instance. This includes compliance with all posting and filing requirements as well as with the annual assessment work

and consequent filing requirement. Most importantly, the applicant must prove to the BLM that he has made a discovery of valuable minerals within the limits of the claim. The discovery requirement has become increasingly stringent in the past several years to the point that a full geologic and economic evaluation is required, including the consideration of discovered reserves, the available market for the mineral, access to the market including costs of transportation, the costs to be incurred in compliance with all federal, state and local environmental regulations, accessibility and costs of water supplies, and costs of labor, equipment, etc. In short, the claimant must prove to the Bureau of Land Management that he has a presently economically feasible discovery of valuable minerals such that a prudent person would be justified in proceeding in the development of the property. *See United States v. Coleman,* 390 U.S. 599 (1968).

(b) The procedural steps required to be taken in the application for a mineral patent are quite complex and need not be recited in full herein. The pertinent federal regulations setting forth the steps to be taken by the applicant are attached hereto as Exhibit "A" and by this reference made a part hereof (43 C.F.R. part 3860).

The most important components of the regulatory requirements are first, the completion of the survey of the mining claims by a United States Mineral Surveyor, made under the authority of the Cadastral Engineer and according to federal surveying requirements (*see* 43 C.F.R. § 3861.1-§ 3861.6). Secondly, proper certification of title must be made to the satisfaction of the Bureau of Land Management. (*See* 43 C.F.R. § 3862.1-3). Finally, and potentially most important, notice of the patent application must be published as well as posted at the claim, and an adverse action or protest may at this point be commenced by another individual to protest the patent application. (*See* 38 C.F.R. Parts 3871, 3872). Further, 43 C.F.R. Parts 1840 and 1850 provide the procedure by which the Bureau of Land Management itself may contest the patent application. The contest proceeding is brought for any failure perceived by the BLM in meeting the statutory requirements. Such failure will generally include the lack of a valuable discovery on the claim, but may also include problems

concerning adverse rights in the land, withdrawals of the land from location or failure of any of the many procedural requirements.

7. The time and problems involved in the mineral patent application procedure can initially be documented by a case relied upon in this matter by the defendant. Specifically, in *State of South Dakota v. Andrus,* 614 F.2d 1190 (1980), the mineral patent application before the Court in 1980 had been commenced at the latest, in October 1969. (*See United States v. Pittsburgh Pacific Co.,* 30 I.B.L.A. 388, at 392, (1977), where the Interior Board of Land Appeals, in the first challenge to the patent application, notes at footnote 4 that the first Pittsburgh Pacific Co. cost analysis had been prepared in October of 1969). Thus, in the precise case relied upon by defendants for their proposition that the issuance of patent is "automatic", the mineral patent application had been pending for a minimum of eleven (11) years prior to the decision of the Court of Appeals for the Tenth Circuit.

Similar case histories can be found in Frank Erisman and Marla J. Williams, "Watt's Up for Patenting?", 29 Rcky.Mt.Min.L.Inst. 321 (1983). For example, the authors recite at pp. 331-333 the history of a patent application made by United States Steel Corp. The patent applications were filed in October of 1967, and after fourteen (14) years of consideration, the applications were rejected by the Bureau of Land Management. *See United States Steel Corp.,* 52 I.B.L.A. 319 (1981).

These specific cases help to illustrate the problems involved in obtaining a mineral patent. Further, as recited above, I cite approximate time and cost figures based upon my experience with the numerous actual patent applications which I have undertaken.

I DECLARE UNDER PENALTY OF PERJURY that the foregoing is true and correct.

DATED this 26th day of April, 1984.

/s/ ROGER W. JEPPSON
Roger W. Jeppson, Declarant

[Exhibits omitted in printing]

[Certificate of acknowledgment omitted in printing]

DECLARATION OF BRUCE G. WOOLPERT (EXHIBIT D TO PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, FILED MAY 9, 1984 IN DISTRICT COURT)

[Caption omitted in printing]

DECLARATION OF BRUCE G. WOOLPERT

I, Bruce G. Woolpert, declare and state as follows:

1. This Declaration is made in support of Plaintiff's Motion for Summary Judgement, *Granite Rock Company versus California Coastal Commission.*

2. I am President and one of the owners of Granite Rock Company, which is owned by my family. Granite Rock Company was founded in 1900 by my wife's father. My wife and our son, in his early 30's, are active in the top management of our Company. Since the 1920's, our Company has been a major supplier of rock and sand, ready mixed concrete and asphaltic concrete in the San Francisco and Monterey Bay areas. I am a Registered Civil Engineer in the State of California, a former Assistant Professor of Civil Engineering at Stanford University, and a past president of the California County Planning Commissioners Association.

3. I am very familiar with the Big Sur Coast and the enormous white, chemical grade, fine grinding limestone deposit at Pico Blanco. (Estimated by the State Division of Mines and Geology and the consulting geologists doing the exploration work to be in excess of one billion tons.) In 1982, after extensive study, the California State Division of Mines and Geology recommended classification of the Pico Blanco deposit as of statewide significance (MRZ-2) to the California State Board of Mines and Geology. The deposit was then so classified.

A quote from the abstract is as follows:

> "Although there are limestone deposits in California that produce various grades of limestone, there is only one other deposit known in California from which high-grade, white-grinding limestone is presently (1979) being produced. This deposit is located in Lucerne Valley, San Bernardino County, California."

Since our Company is in the mineral resource business, we budget every year for additional reserves. In the early 1960's we did the discovery work to establish Lode Claims on U. S. Forestry land, which we followed with extensive exploration to prove the deposit to be white, chemical grade limestone. This exploration work was immediately followed by the obtaining of necessary easements from Highway 1 to the deposit and the building of the required roads with the greatest possible sensitivity to the environment.

4. Granite Rock Company's quarrying of the Pico Blanco claims began in 1981, under a United States Forest Service Plan of Operation, based on a Forest Service Environmental Assessment Report. The Environmental Assessment Report was the result of studies and field work of a team of thirteen (13) Forest Service specialists, (Forest Geologist; Forest Landscape Architects [2]; Monterey District Wilderness Manager; Monterey District Fuel Management Foreman [fire]; Monterey District Fire Management Officer; Monterey District Planner; Monterey District Resource Officer; I.D. Team; Sinclair, Los Padres Forest Landscape Architect; Grove, Los Padres Forest Geologist; Grandoff, Monterey District Archaelogist; Thomas, Monterey Range Technician; Jones, California Regional Water Quality Control Board; Pine, Fish and Game.), plus Granite Rock Company's consultants, California Department of Fish and Game, and the Regional Water Quality Control Board. The stated broad objectives of the report were to: (1) Minimize adverse environmental impacts to surface resources, while providing for the continuing of mining activities; (2) Identify cultural resources of the area; (3) Retain optimum visual quality attainable during and after mining activities. Specific decision criteria is based on (1) air quality; (2) water quality; (3) soil stability; (4) fish and wildlife habitat; (5) cultural resources habitat; (6) visual im-

pacts. After weighing these items, those applicable were specifically incorporated into the Plan of Operations, which includes reclamation measures.

5. The white, chemical grade limestone deposit in the Pico Blanco area is actually of National significance, since it is the largest deposit of this high quality West of the Mississippi.

6. High-quality, white limestone is a most versatile mineral and various universities and mining agences list over sixty (60) chemical and industrial product groups for which it is essential or the most effective ingredient. Many of the larger volume uses are directly associated with environmental control and protection, i.e., (a) water filtration and acid reduction; (b) stack gas control for acid removal on large combustion plants; (c) control of Acid Rain; (d) acid control of lakes and reservoirs; and (e) neutralization of chemical toxic wastes. Large volume industrial uses are: (a) plastic fillers to replace scarce and expensive petroleum-based products; (b) livestock and poultry feed additives; (c) paint fillers; and (d) Glass flux for all glass products. Important but of smaller volume use are pharmaceutical fillers. These require great purity and cannot contain even small amounts of such elements as arsenic. Arsenic is found in some deposits which eliminates them for use in pharmaceuticals; however, Pico Blanco has none.

7. Claims are unpatented on the white, chemical grade limestone in the U. S. Forestry land in the Pico Blanco area. The exploration, annual assessment work, road construction, and operations have always been done under the supervision and approval of the U. S. Forest Service.

8. Exhibit "A" is a photograph which I took in 1982 to show Granite Rock Company's private road from Highway I at the Ocean to the Lode Claims on the white, chemical grade limestone on the U. S. Forestry land. This road is approximately five miles in length. This picture is intended to show the environmental sensitivity by Granite Rock Company during construction and maintenance of the road.

9. Exhibit "B" is a photograph which I took in 1982 to show the whiteness of the deposit on the surface, the lack of overburden, and the enormous size of the deposit covered by Lode Claims on U. S. Forestry land.

10. Exhibit "C" is a photograph which I took in 1982 to show Granite Rock Company's operating quarry on the Lode Claims on U. S. Forest Land. This quarry picture shows the white, chemical grade limestone, and the lack of overburden on the deposit.

I declare under penalty of perjury that the foregoing is true, and correct and that this declaration was executed in Santa Cruz County on May 8, 1984.

/s/ BRUCE G. WOOLPERT
Bruce G. Woolpert

[Exhibits omitted in printing]

In the United States District Court
Northern District of California

[Caption omitted in printing]

[Filed May 10, 1984]

ERRATA IN PLAINTIFF'S ANSWERS TO DEFENDANT'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR ADMISSIONS

Plaintiff's Answer to Interrogatory No. 8. A) is corrected to read:

> A) Plaintiff has not yet retained experts or made the necessary studies to determine a current dollar value. However, Plaintiff has determined that its mining operation has tremendous value and is capable of providing a viable economic return of and on reasonably invested capital. See 8C below.

Plaintiff's Answer to Request for Admission No. 3 is corrected to read:

> See answer to Interrogatory No. 1 and Request for Admission No. 1.

Dated: April 30, 1984

JESS S. JACKSON
A Professional Corporation

/s/ JESS S. JACKSON
Attorneys for Plaintiff

[Proof of service by mail omitted in printing]

EXCERPT FROM STATE OF CALIFORNIA COASTAL MANAGEMENT PROGRAM AND FINAL ENVIRONMENTAL IMPACT STATEMENT (EXHIBIT A TO APPELLEES' REQUEST TO TAKE JUDICIAL NOTICE, FILED DEC. 17, 1984 IN COURT OF APPEALS).

CHAPTER 11

MANAGING THE COAST (6): THE NATIONAL INTEREST AND THE CONSISTENCY OF FEDERAL ACTIONS

. . .

[Material omitted in printing]

Excluded Federal Lands

The national interest in the coast also includes consideration of activities of Federal agencies in facility construction, grant programs, and regulatory programs. To bring the activities of the many Federal agencies within the context of comprehensive planning, the CZMA included the "Federal consistency" requirements (quoted below) and encouraged Federal agencies to coordinate and cooperate with the State to meet the purposes of the CZMA. However, the CZMA also excludes "from the coastal zone . . . lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." (Section 304(a)). In response to the CZMA, the California Coastal Act includes identical language. (Section 30008). Because there was some disagreement as to the scope of this exclusion clause, NOAA requested an advisory opinion from the U.S. Attorney General in an attempt to clarify the matter. An August 1976 opinion held that all lands *owned* by the United States are excluded from the coastal zone. In its draft Section 307 regulations, NOAA has proposed to also exclude from the coastal zone lands *leased* or otherwise used or held in trust by the Federal Government based on further Justice Department review of its August, 1976, opinion. While the Coastal Commission does not agree with either of these opinions, based on comprehensive management principles, it will abide by these preliminary conclusions in the administration of the CCMP for purposes of the CZMA. However, the Coastal Commission

reserves the right to include Federally-owned and/or leased lands in the coastal zone in the event judicial, legislative, or administrative modification should occur.

Although all lands owned by the Federal government are excluded from the California coastal zone, Federal activities, including development projects on these lands which directly affect the coastal zone, must be consistent, to the maximum extent practicable, with the California Coastal Management Program. Under CZMA Sections 307(c)(1) and (2), Federal agencies are responsible for determining whether their activities directly affecting the coastal zone are consistent to the maximum extent practicable with the California Coastal Management Program. If the Coastal Commission disagrees with a Federal agency decision, mediation by the Secretary of Commerce or judicial review may be sought. Federal agencies, and in particular the Navy which is the Federal agency most dependent on coastal installations for its continued operations, have displayed increasing sensitivity to environmental issues in their operations. The Navy has cooperated in the development of the California Coastal Management Program by making its interests known to the State. It is Navy policy to conduct Navy activities to the maximum extent practicable consistent with the CCMP so long as national defense objectives are met.

[Remainder of exhibit omitted in printing]

[Letterhead]

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 31, 1986

Mr. Linus S. Masouredis
6000 St. Building
350 McAllister Street
San Francisco, CA 94102

Re: California Coastal Commission, et al., v. Granite Rock Company No. 85-1200

Dear Mr. Masouredis:

The Court today entered the following order in the above entitled case:

Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

/s/ JOSEPH F. SPANIOL, JR.

APPELLANT'S

BRIEF

Supreme Court, U.S.
FILED
JUN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1200

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

CALIFORNIA COASTAL COMMISSION, et al.,
Appellants,
vs.
GRANITE ROCK COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Whether state environmental regulation of private mining on national forest land has, by implication, been preempted by the U.S. Forest Service surface use regulations, 36 C.F.R. §§ 228.1-228.15, when state police power authority to regulate mining is specifically preserved under the 1872 Mining Act and when the Forest Service has itself recognized, in its regulations and in agreements with state agencies, the independent regulatory authority of the states.

2. Whether the Ninth Circuit violated the ripeness doctrine by concluding that state environmental regulation would necessarily conflict with Forest Service regulation even though state regulation has not yet been applied to the subject mining and even though the state acknowledges that it may not deny a permit for the subject mining when state regulation is applied.

PARTIES

Appellants, who were defendants below, are the members of the California Coastal Commission, Steve MacElvaine, Donald McInnis, Gilbert Contreras, Thomas McMurray, Jr., Michael Wornum, Robert Franco, Dorrill Wright, Leo King, Dr. Gordon F. Snow, Dwight Sanders, Charles E. Warren, David Malcolm, Christine Diemer, Mark Nathanson and Duane Garrett,[1] and the Central Coast Regional Director of the Coastal Commission staff, Edward Brown.

Appellee, plaintiff below, is Granite Rock Company, a California corporation.

[1] Appellants Charles E. Warren, David Malcolm, Christine Diemer, Mark Nathanson and Duane Garrett are present Commissioners of the Coastal Commission who succeeded Melvin Nutter, C. Patrick Callahan, Susan Golding, George Shipp III and Carolyn McNeill, previous Commissioners named as defendants. Gilbert Contreras is also a present Commissioner who succeeded Marshall Grossman, a previous Commissioner who was a party to this appeal. Mr. Contreras is substituted as an appellant pursuant to Supreme Court Rule 40.3.

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On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF FOR APPELLANTS

OPINIONS BELOW

The decision of the Court of Appeals is reported at 768 F.2d 1077 and is reprinted in the Appendix to the Jurisdictional Statement ("J.S. App."), A-1-10. The decision of the district court is reported at 590 F.Supp. 1361, and is reprinted at J.S. App., A-11-32.

JURISDICTION

Granite Rock Company has questioned whether the Court has appellate jurisdiction in this case under 28 U.S.C. § 1254(2),[2] and the Court has postponed determination of that question. Joint

[2] 28 U.S.C. § 1254(2) provides, in pertinent part that:
"Cases in the courts of appeals may be reviewed by the Supreme Court by . . . appeal by a party relying on a state statute held by a

(Footnote 2 continued on following page)

Appendix ("J.A.") 107. For the reasons that follow, this case is reviewable by appeal.

1. The California Coastal Act, Cal. Pub. Resources Code §§ 30000-30900 ("Coastal Act") requires a person who undertakes a "development" in the "coastal zone" to obtain a coastal permit from the California Coastal Commission.[3] In 1983, the Coastal Commission staff notified Granite Rock that it must apply for a coastal permit for its mining within the coastal zone on the Big Sur Coast. J.A. 22-24.

Granite Rock then commenced this action in the district court seeking a declaration that Coastal Act permit regulation was preempted by federal laws, including the 1872 Mining Act, 30 U.S.C. §§ 22-54, and the Forest Service surface use regulations, 36 C.F.R. §§ 228.1-228.15. An injunction against any state permit enforcement was also requested. J.A. 7-14. The complaint specifically alleged a challenge to the constitutionality of the Coastal Act as applied to Granite Rock's operations.[4]

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court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . ."

[3] See Cal. Pub. Resources Code § 30103 (definition of the "coastal zone"), reprinted in J.S. App. A-61-62; § 30106 (definition of "development"), J.S. App. A-62-63; § 30600 (permit requirement for developments in the coastal zone), J.S. App. A-83-84.

[4] Thus, the complaint alleged that "[t]he application of the State Coastal Act to [Granite Rock's] mining claims on federal lands . . . will require [Granite Rock] to apply for a permit for its mining activities on federal lands . . . ", para. V(b), J.A. 13, and that, "[b]y reason of the foregoing, the requirements of the California Coastal Act, as applied, are preempted by federal law, are in conflict with the federal regulatory scheme . . . and violate the Supremacy Clause of the Constitution", para. VI, J.A. 13.

The district court also referred to "[Granite Rock's] facial challenge to the CCA's [California Coastal Act's] provisions," J.S. App. A-28; and Granite Rock appears to have characterized its claim as "a facial challenge to a statute", in one of its appellate briefs. See Appellant's reply brief, p. 10.

It is undisputed that, as a matter of state law, the Coastal Act permit requirement applies to Granite Rock's mining activities.[5]

Thus, the question whether a state permit requirement may be imposed on Granite Rock necessarily reduces to the question whether the Coastal Act as applied to Granite Rock is constitutionally valid.

The Ninth Circuit held that the state permit requirement may not be imposed upon Granite Rock because "an independent state permit system . . . would undermine the Forest Service's own permit authority and thus is preempted". J.S. App., A-9. Although the Ninth Circuit did not say in so many words that the particular permit provisions of the Coastal Act were invalid, the court did not question the Coastal Commission's position that "the California Coastal Act . . . required the company to obtain a

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[5] Cal. Pub. Resources Code § 30106 expressly defines a "development" for which a permit is required, as including "mining" and "construction"—activities which Granite Rock has indisputably carried out. See J.A. 69 (int. ans. 1); J.A. 73-74 (int. ans. 11, 12); District Court Clerk's Record ("CR") 32; Ex. A (proofs of labor); Ex. B (map). There is also no dispute that the "coastal zone" as defined in Cal. Pub. Resources Code § 30103, extends 5 miles inland from the Pacific Ocean in the Big Sur area, and that Granite Rock's mining is occurring within the geographic bounds of the coastal zone. See J.A. 74 (ans. to req. for admission 1); C.R. 22, p. 2.

The district court also found that Granite Rock's mining is within the geographic boundaries of the coastal zone, J.S. App. A-16; that the Coastal Act requires permits for mining and construction, *id.*, A-14; and that the Coastal Act "requires [Granite Rock] to secure a permit from the [Coastal Commission]," *id.*, A-31. The Ninth Circuit did not disturb these findings and conclusions. Accordingly, this is not a case where there is any uncertainty whether state law does in fact apply to the conduct at issue, cf. *Burger King Corp.* v. *Rudzewicz*, 105 S.Ct. 2174, 2181 n. 12 (1985), nor is there any independent state law basis for concluding that the permit requirement may not be applied to Granite Rock, compare *City of Mesquite* v. *Aladdin's Castle Inc.*, 455 U.S. 283, 292 (1982).

state permit" for its mining. J.S. App., A-2.[6] Therefore, to paraphrase *Franchise Tax Board* v. *U.S. Postal Service*, 467 U.S. 512, 515 n.7 (1984), "a *necessary predicate* to the Court of Appeals' holding [that the permit requirement may not be imposed upon Granite Rock] is that enforcement of the state statute [which imposes that permit requirement] would be inconsistent with federal law and hence invalid under the Supremacy Clause". (emphasis added).

The Ninth Circuit's reference to the "state permit requirement" throughout its decision, see J.S. App. A-2, A-3, A-4, was simply a shorthand reference to the state statutory provisions themselves which imposed the permit requirement.[7] See *California v. Grace Brethren Church*, 457 U.S. 393, 406 (1982) (references to tax "scheme" refers to the statutory provisions establishing the scheme). As in *Franchise Tax Board, supra*, the Ninth Circuit's decision can only be read as having invalidated a state statute on federal Supremacy grounds.

2. The holding of invalidity contemplated by 28 U.S.C. § 1254(2) includes determinations that state law is preempted. E.g., *Hayfield Northern Railroad Co. v. Chicago & Northwestern Transportation Co.*, 467 U.S. 622, 627 (1984); *Tully v. Mobil Oil Corp.*, 455 U.S. 245, 246 n.1 (1982); *Malone v. White Motor Corp.*, 435 U.S. 497, 499 (1978). Moreover, appellate jurisdiction has been found in circumstances similar to those here where state or local permit requirements have been held to be preempted. See *Ventura County v. Gulf Oil Corp.*, 445 U.S. 947 (1980), *aff'g.*, 601 F.2d 1080 (9th Cir. 1979); *Minnesota v. Northern States Power Co.*, 405 U.S. 1035 (1972), *aff'g.*, 447 F.2d 1143 (8th Cir. 1971). That the Ninth Circuit did not invalidate Coastal Act permit regulation in all conceivable circumstances does not pre-

[6] The parties' briefs in the Ninth Circuit also referred to the provisions of the Coastal Act which established the permit system and imposed the permit requirement. See Appellant's opening brief, pp. 3 n.5, 36, 38; Appellee's brief, pp. 3, 7, 24, 25.

[7] The district court's reference to the "CCA [California Coastal Act] permit requirement", J.S. App., A-17, A-25, A-26, A-29, A-30, was also simply a shorthand reference to the statutory provisions themselves.

clude appellate jurisdiction under § 1254(2). It is sufficient that state law was held invalid and unenforceable as applied to the facts of a particular case.[8]

3. Granite Rock argues that appellate jurisdiction does not lie in this case because of the distinction in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 (1984), between cases "in which a state statute is expressly struck down on constitutional grounds"—which are appealable—and cases "in which an exercise of authority under state law is invalidated without reference to the state statute"—which are not. Motion to dismiss or affirm, pp. 4-5. But applying the *Silkwood* distinction does not turn on whether the court of appeals recited the code sections of the state statute under challenge in its opinion. Even if there is no express finding of statutory invalidity, appellate jurisdiction still lies if a "necessary predicate" for the result reached by the court of appeals is an implicit finding that a statute is invalid. *Franchise Tax Board, supra*, 467 U.S. at 515 n.7.

The *Silkwood* distinction is based on the need to avoid overburdening this Court's mandatory jurisdiction with cases where particular discretionary agency action is invalidated on grounds that do not reach the issue of a statute's validity. Thus, appellate jurisdiction does not lie 1) where an exercise of discretion under a state statute is struck down because it infringes a constitutional right, *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 42-43 (1983); *Richmond Newspapers Inc.* v. *Virginia*, 448 U.S. 555, 562-563 n.4 (1980) (28 U.S.C. § 1257(2)); *Hanson* v. *Denckla*, 357 U.S. 235, 244 (1958) (28 U.S.C. § 1257(2)); 2) where a state statute is construed, as a matter of state law, in accordance with federal constitutional limitations, *Burger King Corp.* v. *Rudzewicz, supra*, 105 S.Ct. at 2181 n.12; or 3) where it is unclear whether the validity of a state statute was

[8] See *Dutton v. Evans*, 400 U.S. 74, 76 n. 6 (1970); *City of Detroit v. Murray Corp.*, 355 U.S. 489, 491-92 (1958); cf., *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921) ("That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another.") (construing 28 U.S.C. § 1257(2)).

even in issue and where the challenged state action may have been based on common law rather than statutory authority, *Silkwood* v. *Kerr-McGee Corp.*, *supra*, 464 U.S. at 247. In all of these cases, the particular holdings did not reach or necessarily implicate the validity of the statute itself.

This, however, is not such a case. Rather than involving a concededly valid statute which is claimed to have been misconstrued as a matter of state law, this is a case where a state statute that concededly covers Granite Rock's mining was invalidated and rendered unenforceable on Supremacy grounds. In contrast to *Silkwood*, there has never been an exercise of discretion under state law because Granite Rock has challenged whether the Coastal Act on its face may be applied to its activities. Appellate jurisdiction therefore properly lies under 28 U.S.C. § 1254(2).

4. Even if this case is not properly cognizable under 28 U.S.C. § 1254(2), the Court should still review the Ninth Circuit's decision by certiorari. 28 U.S.C. § 2103. The issues presented are of great importance to the states, and the Ninth Circuit's decision conflicts with decisions of other state supreme and appellate courts which have upheld state environmental regulation of private mining on federal land.[9] Accordingly, this Court should reach the merits and decide this case, either by appeal or certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. The Supremacy Clause of the Constitution, Art. VI, cl. 2, provides in pertinent part that:

> "the Laws of the United States . . . shall be the supreme law of the Land"

[9] See *State ex rel. Andrus* v. *Click*, 97 Idaho 791, 554 P.2d 969 (1976) (*Click I*); *State ex rel. Evans* v. *Click*, 102 Idaho 443, 631 P.2d 614 (1981), *cert. denied*, 457 U.S. 1116 (1982) (*Click II*); *Gulf Oil Corporation* v. *Wyoming Oil and Gas Conservation Commission*, 693 P.2d 227 (Wyo. 1985); *State ex rel. Cox* v. *Hibbard*, 31 Ore. App. 269, 570 P.2d 1190 (1977).

2. The 1872 Mining Act is codified in various sections of 30 U.S.C. §§ 22-54, the relevant portions of which are reprinted in J.S. App., A-37-41.

3. The Forest Service regulations in 36 C.F.R. §§ 228.1-228.15 are reprinted in full in J.S. App., A-42-55.

4. The relevant provisions of the California Coastal Act establishing a permit system and permit criteria are reprinted in J.S. App., A-56-85.

STATEMENT OF THE CASE

A. The Nature of Granite Rock's Mining in Big Sur

Granite Rock's open pit limestone mining is occurring on the slopes of Mt. Pico Blanco in the heart of the scenic, nationally renowned Big Sur Coast. See J.A. 39, 40, 58, 67. Pico Blanco is a prominent landmark on the Big Sur Coast which is visible from Highway One, J.S. App., A-86, a heavily travelled tourist road and a designated State Scenic Highway, Cal. Pub. Resources Code § 30254. The mountain also divides the south and main forks of the Little Sur River, J.A. 46, a protected waterway designated under the California Protected Waterways Act, Cal. Stats. 1973, Res. Ch. 113. The mining on Pico Blanco is occurring just inside the boundaries of the Los Padres National Forest, in close proximity to Molera State Park, the Ventana Wilderness and the south fork of the Little Sur River. J.A. 58-60, 67.

The mining activities include bulldozing to scrape away surface land, blasting and excavating a five acre open pit quarry, cutting roads along Pico Blanco, building a bridge, boring test holes and conducting core drilling, improving a water storage system, and dumping rock waste on a steep slope roughly 2,000 feet from the south fork of the Little Sur River. J.A. 27-28, 38-41, 48, 69, 73-74; J.S. App., A-15. Photographic exhibits illustrate how the quarry and the mining roads are dominant features of the otherwise undisturbed visual landscape. J.A. 58-66.[10] The natural

[10] The current mining operations are visible from public viewing points in Molera State Park, the Ventana Wilderness and trails in the

(Footnote 10 continued on following page)

beauty of the Big Sur Coast, including Pico Blanco, attracts an estimated 2.9 million visitors a year. Monterey County Big Sur Coast Land Use Plan, Nov. 1985, p. 66. As stated in the declaration of the late Ansel Adams, the area is one of "unparalleled natural beauty". J.S. App., A-87.

The limestone being stripped from the mountain is suitable for cement, glass, and pharmaceutical and chemical uses. J.A. 39. Due to the extensive nature of the limestone deposits on Pico Blanco covered by Granite Rock's 32 mining claims, J.A. 30, 31, 34, 39; C.R. 39, Ex. C, App. C (geologist report), the company contemplates future operations in excess of 50 years, J.A. 28; J.S. App., A-31, and the Forest Service foresees mining for 25-50 years, with a 20-25 acre quarry. J.A. 41; C.R. 39, Ex. C, App. C.

B. The 1872 Mining Act

Under the 1872 Mining Act, miners like Granite Rock may enter federal lands to prospect for and exploit hardrock minerals, and obtain title to the land. See generally *United States v. Locke*, 105 S.Ct. 1785, 1788 (1985); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 658 n.1 (1980). By discovering a valuable mineral deposit and complying with federal and state recording and location requirements, a prospector obtains a valid mining claim. See *Union Oil Co. v. Smith*, 249 U.S. 337, 348-349 (1919). A valid mining claim is "a unique form of property", *Best v. Humboldt Mining Co.*, 371 U.S. 334, 335 (1963); it entitles the holder to the exclusive possession of the land for mining purposes, 30 U.S.C. § 26; *Wilbur v. Krushnic*, 280 U.S. 306, 316 (1920); it is potentially of indefinite duration provided that the miner annually performs $100 worth of assessment work, 30 U.S.C. § 28, and files a notice of intention to hold the claim, 43 U.S.C. § 1744; and it allows the miner to extract and sell the minerals without payment of royalties to the federal government.

Holders of valid claims may also obtain a patent and fee title to the land by proving discovery of a valuable mineral, performing at least $500 worth of assessment work, and paying a nominal sum.

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area but not from Highway One. J.A. 47, 59; C.R. 39, Ex. C, App. D (visual analysis report), pp. 7-8.

30 U.S.C. § 29.[11] If the statutory requirements are met, the miner has an "absolute right" to a patent, *United States v. Etcheverry*, 230 F.2d 193, 197 (10th Cir. 1956), the issuance of which by federal authorities is non-discretionary, *State of South Dakota v. Andrus*, 614 F.2d 1190, 1193 n.3 (10th Cir.), *cert. denied*, 449 U.S. 822 (1980). Once the lands are patented, they are, of course, subject to the full range of state police power just like any other private land. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 377 (1977). Miners are not required to obtain patents, however, and "many miners never bother to seek patents", *Alaska Miners v. Andrus*, 662 F.2d 577, 579 (9th Cir. 1981), apparently because the possessory right of valid mining claim holders "for all practical purposes of ownership is as good as though secured by patent". *Wilbur v. Krushnic*, *supra*, 280 U.S. at 317. The Department of the Interior's Bureau of Land Management (BLM) administers the 1872 Mining Act on federal lands, including those in the National Forest system, see 43 C.F.R. §§ 3831.1-3873.3.

Granite Rock contends that it holds valid patentable mining claims by virtue of having located a valuable mineral, and having complied with federal and state recording, location and assessment work requirements. J.A. 70 (int. ans. 5), 72 (int. ans. 9); C.R. 32, Ex. B (map); Ex. C (mineral sales invoices); J.S. App., A-15-16; 19-20. Although Granite Rock could obtain a patent and fee title to the forest lands it is mining, it has refrained from doing so. Granite Rock also owns other adjacent limestone-bearing lands in fee that are outside the national forest boundary, J.A. 31, 32, 34, 39; C.R. 32, Ex. B (map); Ex. E (Aug. 8, 1980 Woolpert letter), but it has chosen to mine only inside the national forest. Had Granite Rock mined the same limestone deposit a few hundred feet away outside the national forest boundary, or had it paid a nominal sum and obtained a patent, its mining would be indisputably subject to Coastal Act permit regulation.

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[11] The purchase price is $5.00 an acre for lode claims, 30 U.S.C. § 29, and $2.50 an acre for placer claims, 30 U.S.C. § 37.

C. The Forest Service Regulations

In 1974, the Forest Service adopted surface use regulations in 36 C.F.R. §§ 228.1-228.15 for 1872 Mining Act activities in the national forests, pursuant to its authority under the Organic Administration Act of 1897, 16 U.S.C. § 551. For a number of years prior to 1974, the Forest Service had doubts about its authority to adopt regulations to control mining activities.[12] During this time, the states had provided the surface resources and environmental regulation controls.[13] Thus, the Forest Service regulations were enacted against a backdrop of preexisting state environmental regulation of private mining on national forest land.

The Forest Service regulations are designed to "minimize adverse environmental impacts on National Forest System surface resources" caused by mining activities under the 1872 Mining Act. 36 C.F.R. § 228.1. The regulations disclaim any purpose "to provide for the management of mineral resources"

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[12] See for example the June 6, 1969 letter from Edward Cliff, Chief, Forest Service to Senator Frank Church, stating that the Forest Service "has no authority to . . . restrict actual mining operations . . . or to regulate or control the type of mining involved such as 'open pit', 'strip' or, 'subsurface.'" reprinted in 115 Cong. Record 18231-18232 (July 2, 1969); see also Dempsey, *Forest Service Regulations Concerning the Effect of Mining Operations on Surface Resources*, 8 Nat. Res. Lawyer 481, 482 (1975); Parcel, *Federal State and Local Regulation of Mining Exploration*, 22 Rocky Mtn. Min. Law Inst. 405, 408-409 (1976); Ferguson & Haggard, *Regulation of Mining Law Activities in the National Forests*, 8 Land & Water L. Rev. 391, 404 (1973).

[13] For example, the Idaho Dredge and Placer Mining Protection Act was enacted in 1955 and was being applied to mining on federal forest land by 1972 at the latest. See *Click I, supra*, 554 P.2d at 972-973. The Forest Service had also entered into a 1971 agreement with the State of Washington which acknowledged that the Washington Surface-Mined Land Reclamation Act, Rev. Code Wash. Ann. §§ 78.44.010 et seq., would apply to national forest land. The 1971 agreement also provided for coordination between state and Forest Service personnel in implementing the state regulation. J.S. App. A-108.

and acknowledge that that is the responsibility of the Department of the Interior. *Id.*

Under the Forest Service regulations, miners must submit plans of operation which identify the miner, *id.*, § 228.4 (c)(1); the location of the mining, *id.*, § 228.4(c)(2); the nature of the intended operations, *id.*, § 228.4(c)(3); and the measures to protect surface resources, including measures demonstrating compliance with federal and state environmental standards for air and water quality, solid waste, scenic values, fisheries and wildlife habitat, and reclamation, *id.*, §§ 228.4(c)(3), 228.8(a)-(g). Rather than exempting miners from state laws, the regulations specifically require miners to comply with state environmental and police power laws and requirements. See 36 C.F.R. § 228.8(a) (state air quality standards); *id.*, § 228.8(b) (state water quality standards); *id.*, § 228.8(c) (state standards for solid wastes); *id.*, § 228.9 (state public safety laws and regulations); *id.*, § 228.11 (state fire laws). The Forest Service regulations also rely on the existence of parallel state permit systems by providing that:

> "[c]ertification or other approval issued by State agencies . . . of compliance with laws and regulations relating to mining operations will be accepted as compliance with similar or parallel requirements of these regulations." *Id.*, § 228.8(h).

A number of Western states have laws providing for environmental permit regulation of mining on lands within their boundaries, including federal lands.[14] The Forest Service has entered into cooperative agreements with various states and local governments that recognize and provide for coordination of dual federal and

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[14] See Colorado Mined Land Reclamation Act, Colo. Rev. Stats. §§ 34-32-101 et seq.; Idaho Dredge Mining Protection Act, Idaho Code §§ 47-1312 et seq.; Idaho Surface Mining Act, Idaho Code §§ 1501 et seq.; Montana Metal Mine Reclamation Act, Mont. Code Ann. §§ 82-4-301 et seq.; Ore. Rev. Stats. §§ 517.750 et seq.; Utah Mined Land Reclamation Act, Utah Code Ann. §§ 40-8-1 et seq.; Washington Surface-Mined Land Reclamation Act, Rev. Code Wash. Ann. §§ 78.44.010 et seq.; Wyoming Environmental Quality Act, Wyo. Stats. Ann. §§ 35-11-101 et seq.

state environmental regulation of 1872 Mining Act activities.[15] Some of these cooperative agreements implement § 228.8(h) of the Forest Service regulations by providing a mechanism for satisfying Forest Service requirements through state permit procedures.[16]

In 1981, Granite Rock submitted to the Forest Service a four page plan of operations describing its proposed mining for 1981-86 on Pico Blanco.[17] The Forest Service prepared an environmental assessment for the mining[18] and accepted the plan with certain modifications for mitigation and monitoring.[19]

The Forest Service's modifications to Granite Rock's plan expressly state that:

> "Granite Rock is responsible for obtaining all required permits established by . . . state or local agencies having jurisdiction for environmental components not under the enforcement authority of the U.S. Forest Service. Copies of permits, attainment targets or monitoring requirements will be sent to the District Ranger, who will attach it to the Plan of Operation." J.A. 36-37.

The district ranger's decision accepting Granite Rock's plan of operations also states that:

> "[Granite Rock] is further responsible for obtaining any necessary permits required by State and/or county laws, regulations and/or ordinance". J.A. 54.

And the Forest Service's environmental assessment states that:

> "Granite Rock is responsible for obtaining any necessary permits which may be required by the California Coastal Commission". J.A. 46.

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[15] See the Forest Service's 1979 Memorandum of Understanding ("MOU") with California regarding the California Surface Mining and Reclamation Act, Cal. Pub. Resources Code §§ 2710-2795, J.S. App. A-88-91; 1981 MOU with Colorado regarding the Colorado Mined Land Reclamation Act, J.S. App. A-92-94; 1983 MOU with Idaho regarding the Idaho Dredge and Placer Mining Protection Act and Idaho Surface Mining Act, J.S. App. A-95-101; 1981 MOU with Oregon regarding the Oregon Reclamation of Mining Lands Act, J.S. App. A-102-104; 1984 MOU with Utah regarding the Utah Mined Land Reclamation Act, J.S. App. A-105-107; 1971 Agreement with Washington regarding the Washington Surface-Mined Land Reclamation Act, J.S. App. A-108; and the 1980 MOU with Wyoming regarding the Wyoming Environmental Quality Act, J.S. App. A-109-112. See also the Forest Service's MOUs with the California counties of Del Norte, J.S. App. A-113-116; Fresno, J.S. App. A-117-120; Inyo, J.S. App. A-121-124; Madera, J.S. A-125-128; and Modoc, J.S. App. A-129-133.

[16] The MOUs with California counties provide that the Forest Service will accept mining operation and reclamation plans submitted to local governments under state mining reclamation laws as functional equivalents for its requirements when such state plans meet or exceed Forest Service standards. See J.S. App. A-115, A-119, A-123, A-127, A-131.

[17] Although the 1981-86 plan of operations has expired, this controversy is not moot. The Coastal Commission's 1983 letter informed Granite Rock that it needed a coastal permit for all work done after the 1983 date of the letter, J.A. 22-24, and Granite Rock has admitted doing work after that date, J.A. 83 (ans. to req. for admission 5). Therefore, even though the current plan of operations has expired, there is a controversy as to the need for a permit and appropriate mitigation for surface disturbances that occurred after 1983. Moreover, Granite Rock has definite plans and commitments to continue mining beyond the 1981-86 term, J.A. 83-84 (int. ans. 36); J.S. App. A-31, and therefore this controversy is one capable of repetition yet evading review. See *Wisconsin Dept. of Industry v. Gould*, 106 S.Ct. 1057, 1060 n.3 (1986); *Edgar v. Mite Corp.*, 457 U.S. 624, 630 (1982).

[18] The environmental assessment notes that consultation occurred with representatives of the California Regional Water Quality Control Board (RWQCB) and the Department of Fish and Game. J.A. 52. A RWQCB letter attached to the assessment notes that water quality certification requirements were waived "at this time", but that "it may become necessary to reevaluate the operation in the future" and that a stream monitoring program is recommended. C.R. 39, Ex. C, App. E (Dec. 15, 1980 Jones letter).

[19] The mitigation measures included blasting controls, fire prevention measures, and certain landscaping and rehabilitation of impacted surface areas. J.A. 35-37.

D. The California Coastal Act

The California Legislature enacted the Coastal Act of 1976[20] to protect the quality of the coastal zone environment and to ensure orderly development of coastal resources. Cal. Pub. Resources Code §§ 30001-30002. The Act provides for the issuance of permits for development in a geographically-defined coastal zone. *Id.*, §§ 30103, 30106, 30600. Permits are issued in accordance with the resource protection and use criteria in Chapter 3 of the Act, *id.*, §§ 30200-30265.5, and may be conditioned to ensure that developments are carried out in a resource protective fashion, *id.*, § 30607.

In addition to being a state police power statute, the Coastal Act also serves as one of the components of California's coastal zone management program that was adopted pursuant to the Coastal Zone Management Act, ("CZMA"), 16 U.S.C. §§ 1451-1464.[21] In 1977, the Secretary of Commerce approved California's coastal zone management program and California has received federal grants to implement that program. See *Secretary of the Interior v. California, supra*, 464 U.S. at 317.

[20] The 1976 Coastal Act was a reenactment of earlier coastal protection legislation that was adopted by the people of California as a popular initiative measure in 1972. See generally *Pacific Legal Foundation v. California Coastal Commission*, 33 Cal.3d 158, 162-163, 655 P.2d 306 (1982).

[21] The CZMA establishes a cooperative federal-state program for state regulation of coastal lands and resources. 16 U.S.C. §§ 1451-1452. States are encouraged and are provided federal funding to develop and implement coastal zone management programs, which, after review and approval by the U.S. Department of Commerce, guide land and water uses in the coastal zone. 16 U.S.C. §§ 1454-1455. See generally *Secretary of the Interior v. California*, 464 U.S. 312, 316-317 (1984). The "coastal zone"—for purposes of the CZMA regulatory program—is defined as excluding "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents". 16 U.S.C. § 1453(1). States, of course, are not required to develop coastal zone management programs and participate in the CZMA program, but most coastal states have done so because of the incentives of federal funding and state "consistency review" over federal activities and permits, see 16 U.S.C. § 1456, which are available under the CZMA program. In this case, the Coastal Commission did not timely assert and thereby waived any additional consistency review authority it might have over the federal permit (i.e., Forest Service plan of operation) for Granite Rock's mining. See J.A. 17.

The Coastal Commission has acknowledged in this litigation that it may not deny Granite Rock a coastal permit in order to prohibit all mining.[22] Instead, the Commission seeks to apply its regulation not for purposes of defining permissible uses of federal land, but merely to ensure that a given mining use in a unique coastal area is carried out in an environmentally sensitive fashion.

E. Proceedings Below

Granite Rock asserted two preemption theories below. First, it claimed that the CZMA itself preempted all Coastal Act permit regulation because the lands being mined were excluded from the CZMA definition of the "coastal zone" under 16 U.S.C. § 1453(1), and therefore all state permit regulation—whether it be under the CZMA program or otherwise—was preempted. Second, Granite Rock claimed that apart from the CZMA, the 1872 Mining Act and the Forest Service regulations preempted any state permit regulation of mining on federal lands.

The Coastal Commission urged that the lands being mined did not qualify as excluded lands under § 1453(1) and therefore the mining was within not only the Coastal Act's, but also the CZMA's definition of the "coastal zone." Accordingly, rather than preempting state regulation, the CZMA affirmatively authorized state permit regulation over the lands at issue even if such state regulation might otherwise be impliedly preempted by other federal laws. Second, the Commission urged that even if the lands were excluded from the CZMA definition of the "coastal zone" under § 1453(1) and even if the CZMA had not affirmatively authorized coastal zone management program regulation of the mining, the Coastal Act permit requirement—being asserted simply as a state police power requirement—was not preempted by the 1872 Mining Act or the Forest Service regulations.

[22] See C.R. 36, pp. 6, 41-42; Appellees' brief, pp. 9, 36-37, 42.

The district court found that the mined lands were not excluded under § 1453(1), but held that the CZMA authorization of state coastal regulation over such lands did not otherwise insulate state regulation from preemption challenges under other federal statutes. J.S. App., A-17-25. The district court also concluded that the 1872 Mining Act and Forest Service regulations did not preempt all Coastal Act permit regulation provided that state regulation was not actually applied so as to preclude the exercise of mining rights under the 1872 Mining Act. *Id.*, A-25-31.

The Ninth Circuit reversed. The court of appeals first found that it need not decide the excluded lands question under § 1453(1) because the CZMA, in any event, did not immunize CZMA-authorized state regulation from preemption challenges under other federal statutes. *Id.*, A-6.

Turning to the basic preemption issue, the Ninth Circuit held that the 1872 Mining Act and the Forest Service regulations preempt Coastal Act permit regulation of Granite Rock's mining.[23] Although the court acknowledged that the Forest Service regulations do not occupy the field and that the regulations themselves "recognize that a state may enact environmental regulations in addition to those established by federal agencies", J.S. App., A-9, the court nonetheless concluded that any requirement for a state permit inherently conflicted with the Forest Service's authority. Instead of analyzing whether there were actual conflicts between federal and state regulation, as the district court had done, the Ninth Circuit announced a wooden and mechanical rule: if a federal agency issues some form of permit approval for an activity, any state permit requirement for

[23] While the Ninth Circuit clearly found the Forest Service regulations to be preemptive, its holding with regard to the 1872 Mining Act is arguably ambiguous. The court's statement that it was unpersuaded with the argument that "the *Mining Act* and these regulations" leave room for state mining regulation, J.S. App., A-9, (emphasis added), and its rejection of the *Click I* holding that the 1872 Mining Act does not preempt state regulation, *id.*, appears to be a holding that the 1872 Mining Act—as well as the Forest Service regulations—preempt Coastal Act permit regulation.

the same activity *necessarily* conflicts with federal authority, regardless of any intent to occupy the field. And this purported *per se* preemption rule—which the Ninth Circuit derived from *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U.S. 152 (1946) and *Ventura County* v. *Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd. mem.*, 445 U.S. 947 (1980)—was applied here without comparing the different nature of the federal regulation involved in those cases.

SUMMARY OF ARGUMENT

1. Congress, through the 1872 Mining Act, established a dual system of federal and state regulation of private mining on federal land. The state police powers preserved under the 1872 Act include not only regulation of claim recording and location, but also environmental regulation. The BLM assumes the applicability of, and regularly takes state environmental regulation into account, in administering the 1872 Mining Act. State environmental regulation does not impermissibly impair miners' rights under the 1872 Act because those rights are themselves expressly qualified by state law criteria in the 1872 Mining Act. Any claim that state environmental regulation frustrates a general federal policy of encouraging mining is not only foreclosed by this Court's decision in *Commonwealth Edison* v. *Montana*, 453 U.S. 609 (1981), but overlooks other federal mining policies of minimizing environmental degradation and transferring federal lands into private ownership which presume or are furthered by state regulation.

2. The language of the Forest Service regulations, the Forest Service's practice under them, and the circumstances of their adoption establish that the regulations are not intended to preempt state environmental regulation. Instead, the Forest Service relies upon independent state environmental regulation, which clearly complements the Forest Service's resource protection objectives, to help protect national forest resources. The Ninth Circuit not only misconstrued the intent of the Forest Service regulations, but it ignored Forest Service statements in this very case that Granite Rock should obtain state permits, including a Coastal Act permit.

3. Instead of focusing on the specific features of the particular mining regulatory regime involved in this case, the Ninth Circuit relied on the general, abstract notion that the issuance of both federal and state permits for an activity is inherently incompatible and necessarily impermissible. Such a *per se* preemption rule is erroneous. The idea that a coincidence of federal and state regulation automatically leads to preemption was rejected long ago, and rightly so, since federal and state regulation of a single activity is commonplace in our complex society and our federal system. Once such an abstract rule against dual permitting is put aside, the particular federal regulation at issue here under the 1872 Mining Act and the Forest Service regulations establish that the federal government has not occupied the field of environmental regulation of mining, and that state environmental regulation does not actually conflict with any federal purposes or objectives.

4. Finally, because this case involves a purely facial challenge to state regulation that has not been applied, the Ninth Circuit's presumption that state regulation will necessarily conflict with federal regulation when state regulation is applied is contrary to basic ripeness principles. Such a presumption deprives the states at the outset of the ability to show that they can function as responsible, albeit subordinate governments in our federal system.

ARGUMENT

I

THE 1872 MINING ACT ESTABLISHES A DUAL SYSTEM OF FEDERAL AND STATE REGULATION AND DOES NOT PREEMPT STATE ENVIRONMENTAL REGULATION OF MINING ON FEDERAL LAND

A. The 1872 Mining Act Preserves State Police Power Authority to Regulate Mining Activities on Federal Land

Because it evolved from and largely incorporated pre-existing state regulation, the 1872 Mining Act is a classic example of what has been termed "cooperative federalism", *California* v. *United States*, 438 U.S. 645, 650 (1978). For almost two decades after the 1849 Gold Rush in California, there was no general federal

law of mining on federal land. The miners themselves (in local mining districts) and the state and territorial legislatures created mining rules to fill the void. See *Jennison* v. *Kirk*, 98 U.S. 453, 457-459 (1878); see also Swenson, "Legal Aspects of Mineral Resources Exploitation" in Gates, *History of Public Land Law Development* (1968) pp. 708-716.

When Congress finally enacted legislation in 1866 and 1870, [24] it simply sought to correct the status of miners as trespassers on federal land by ratifying preexisting local regulation and setting minimum federal rules for the acquisition of mining rights and the disposal of federal land title. The 1872 Mining Act refined the earlier 1866 and 1870 legislation but it was based on the same general principles and understanding of the role of state and local regulation.[25]

That federal mining legislation was designed to ratify rather than displace preexisting local regulation was clearly reflected in the debates on the 1866 legislation. In speaking of the mining districts, Representative Ashley of Nevada noted that:

> "[w]e have been without a regular system of law there for seventeen or eighteen years. There has grown up a sort of common law, which has been recognized by our courts. It has answered our purposes. Under it our country has grown up producing for the nation sixty or seventy million dollars annually. *We now simply ask that the rights which have grown up under that system shall be secured to us.*" Cong. Globe, 39th Cong. 1st Sess., 1866, p. 4021 (emphasis added); see also *id.*, p. 4053.

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[24] See the Act of July 26, 1866, 14 Stats. 251 (lode mining), and the Act of July 19, 1870, 16 Stats. 217 (placer mining).

[25] See Cong. Globe, 42d Cong., 2d Sess. 1872, p. 534 (remarks of Sen. Sargent noting that the 1872 legislation did not make important policy changes in the federal mining law but generally continued the policy of the 1866 and 1870 legislation); p. 2457 (remarks of Sen. Stewart); see also Cong. Globe, 41st Cong., 2d Sess. 1870, p. 2028 (remarks of Sen. Sargent noting that the 1870 legislation extended the 1866 Act to placer mining); p. 3045 (remarks of Sen. Stewart).

Senator Higby stated:

> "The simplest proposition in the world is contained in this bill. It is but one proposition, and that is to leave the whole mineral district as heretofore, only saying that what the Government has tolerated for fifteen or seventeen years shall now be legalized by the Government." *Id.*, at 4054.

And Senator Stewart noted that:

> "All there is in this bill is a simple confirmation of the existing conditions of things in the mining regions, leaving everything where it was, endorsing the mining rules. It simply adopts and perfects the existing system allowing these people to enjoy their property without being subject to the fluctuations created now by the agitations in Congress." *Id.*, at 3234.

The "agitations" that Senator Stewart referred to were proposals by Eastern legislators to pay off Civil War debts by subdividing mineral lands and auctioning them off to the highest bidder. See *Swenson*, *supra*, pp. 714-716; 1 *American Law of Mining*, Rocky Mtn. Min. Law Foundation, (1983), § 1.12, p. 38; Cong. Globe, 39th Cong., 1st Sess., 1866, p. 4049. Such proposals were successfully opposed by Western legislators, however, because they threatened to disrupt the property expectations that had grown up under local mining customs. *Id.*, pp. 3226, 3234 (remarks of Sen. Stewart); p. 4052 (remarks of Rep. McRuer); p. 4053 (remarks of Rep. Ashley). Thus, the 1866 legislation was intended to allay uncertainty in the mining districts by disposing of federal mineral lands in accordance with the system of local mining regulation that had grown up in the West, rather than by an entirely new system.[26]

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[26] See *id.*, p. 3227, ("The question then presents itself, how shall the government give title . . . I answer there is but one mode, and that is to assure the title to those who now or hereafter may occupy *according to local rules* suited to the character of the mines and the circumstances of each mining district"); ("In short, [the legislation] *proposes no new system*, but sanctions, regulates and confirms a system to which the people are devotedly attached and removes a cloud of doubt and uncertainty which recently has depressed and retarded the growth and

That the legislation's principle objective was to dispose of rather than protect any federal interests in the mineral lands was clearly reflected in the statements of the bill's author, Senator Sherman:

> "I think it is in the interest of the United States to get rid of the mineral lands of the United States to get them into the hands of private individuals; to give them the title by patents in the ordinary way, so that the United States will be divested of all proprietary rights over the miners.
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> . . .
>
> This bill gives the mineral lands to the people where they are in Nevada and in other mineral states for five dollars an acre, nothing more and nothing less. It gives them the lands for probably less than it will cost to lay them out, survey them, locate them, plat them, and sell them so that it is substantially a grant of the mineral lands to the settlers in the mining regions." *Id.*, p. 3236.

Opposition arguments that preserving local regulatory control was an abdication of Congress' Property Clause powers, *id.*, pp. 4049-4050 (remarks of Rep. Julian), and would result in a multiplicity of conflicting local rules, *id.*, p. 3453 (remarks of Sen. Williams), were rejected.

The debates on the 1872 legislation also indicate that the legislation was designed to maintain stability of property expectations that had grown up under local law, Cong. Globe, 42d Cong., 2d Sess. 1872, pp. 2457-2459 (remarks of Sen. Stewart); p. 2460 (remarks of Sen. Alcorn), and that the legislation "adopts as law the regulations which the miners may make which may be as various as the mines." *Id.*

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prosperity of our mining communities") (remarks of Sen. Stewart) (emphasis added); p. 3235, ("The bill in no respect whatever attempts to change anything that now exists in any section of the mining country. It simply adds the fee-simple to the title *according to the present system* established by the people themselves.") (remarks of Sen. Conness) (emphasis added).

The provisions of the 1872 Mining Act clearly preserve state regulatory control over mining activities. Thus, the right of miners to enter upon federal lands for mining under 30 U.S.C § 22 is not unqualified but is granted "according to the local customs or rules of the miners in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States." The right of valid mining claim holders to the exclusive possession of mineral resources in 30 U.S.C. § 26 is similarly granted "so long as they comply with the laws of the United States and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title . . . " 30 U.S.C. § 28 provides that, subject to the claim recording and work requirement of the provision, "[t]he miners of each mining district may make regulations not in conflict with the laws of the United States or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording [and] amount of work necessary to hold possession of a mining claim . . . " 30 U.S.C. § 38 provides that where miners have "held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or territory where the same may be situated" such evidence shall be sufficient to establish a right to a patent. And 30 U.S.C.§ 43 provides that, "[a]s a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent."

In sum, the legislative history and the structure of the Act demonstrate that the Act was not intended to establish a comprehensive federal regulatory program but only a minimum of federal rules for claim acquisition and patenting. Rather than occupying the field, the legislation confirmed and incorporated preexisting non-conflicting state law as the source of much of the Mining Act's rules. The legislation did not declare any dominant federal interest in uniformity, but was premised on the assumption that regulation "may be as various as the mines". *Supra*, at 21. Rather than proclaiming any federal interest in federal land management or ownership, the legislation was premised on the notion of giving

away federal land at bargain basement prices. And insofar as the legislation conferred mining rights upon miners working federal lands, the purpose was not to secure such private mining rights against any *state* regulation but rather to secure those rights against *federal* revenue raising proposals that threatened to disrupt the regulatory regime that the miners, the states and the territories had themselves created under the "common law" of mining after the Gold Rush.

Thus, state regulation supplementing minimum federal requirements for mining on federal land under the 1872 Mining Act has long been upheld. See, e.g., *Kendall* v. *San Juan Silver Mining Co.*, 144 U.S. 658, 664-665 (1892) (claim recording requirements); *Lockhart* v. *Johnson*, 181 U.S. 516, 526-527 (1901) (location and work requirements); *Butte City Water Co.* v. *Baker*, 196 U.S. 119 (1905) (location requirements); *Erhardt* v. *Boaro*, 113 U.S. 527 (1885) (work requirements); *Northmore* v. *Simmons*, 97 Fed. 386 (9th Cir. 1899) (work requirements); cf. *Forbes* v. *Gracey*, 94 U.S. 762 (1876) (state taxation of unpatented mining claims). State regulation was permissible in these cases even though added economic burdens were imposed upon the exercise of mining rights. Moreover, state regulation was proper even when it was "outcome-determinative" in the sense of determining whether a miner had obtained a valid mining interest under the 1872 Act, or whether a claim belonged to one miner or another. State law was preempted only when it plainly contradicted a specific unambiguous requirement of the 1872 Mining Act. See *Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co.*, 167 U.S. 108, 114-115 (1897).

B. State Environmental Regulation Is Included Among The State Powers That Are Preserved Under The 1872 Mining Act

While environmental regulation by statute was generally not a state concern in earlier years, a measure of regulation was achieved through common law nuisance suits. For example, in California, injunctions were issued against hydraulic mining practices that were devastating rivers and farmland in the late Nineteenth Century. See *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 Fed. 753, 772-779 (9th Cir. 1884); *People v. Gold Run*

Ditch & Mining Co., 66 Cal. 138, 151-152, 4 P. 1152, 1158-1159 (1884); 3 Lindley, *Mines*, § 849, p. 2093-2099 (1914). In more recent times, as the states' police power concerns evolved to address more modern needs, state environmental regulation by statute of 1872 Mining Act activities has also been upheld. See *Click I*, *supra*, 554 P.2d at 976; *Click II*, *supra*, 631 P.2d at 617; *State ex rel. Cox v. Hibbard*, *supra*, 570 P.2d at 1193.

To be sure, the 1872 Mining Act does not expressly mention environmental regulation of mining, either by the federal government or the states. Undoubtedly, that was not because Congress made a conscious decision to leave the matter unregulated, compare *Transcontinental Gas Pipe Line Co. v. State Oil and Gas Board*, 106 S.Ct. 709, 717 (1986), but rather because environmental matters were not commonly dealt with by legislative means in 1872. The fact that Congress did not expressly delegate to states the authority to regulate environmental aspects of mining should not give rise to any negative implication that Congress intended to prohibit such regulation. The Mining Act fails to mention taxation, yet state taxation of unpatented mining claims on federal land was long ago upheld against a preemption challenge. *Forbes v. Gracey*, *supra*, 94 U.S. 762 (1877). In legislating against a backdrop of preexisting state regulation, there is no evidence that Congress intended to preclude state law from evolving to address new concerns or mining issues any more than it intended to limit valuable minerals to those that were known to exist in 1872. Indeed, since federal land managers were not charged with regulating environmental aspects of mining under the 1872 Act, there was no federal environmental regulatory mission with which state regulation could possibly interfere or be inconsistent. Moreover, the generality of the grants of state authority, viz., 30 U.S.C. § 26 ("state, territorial, and local regulations . . . governing . . . possessory title"), § 43 ("any state or territory may provide rules for working mines"), are broad enough to encompass environmental regulation of unpatented mining claim activities.[27]

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[27] When Congress did specifically address the issue of environmental control of mining activities on federal land in the Twentieth Century it authorized states to assume environmental regulatory responsibility for

(*Footnote 27 continued on following page*)

The BLM has had no difficulty in concluding that the state police powers preserved under the 1872 Mining Act include environmental protection, as well as the more traditional matters of location and recording: "The Mining Law of 1872 specifically preserves the applicability of state law governing possessory rights to locators, and we have not read this provision to imply that other state powers, *including those governing environmental protection*, were not preserved". Letter from James M. Parker, Associate BLM Director to J. Allen Overton, President, American Mining Congress (Feb. 1, 1982), reprinted in Kimball, *Impact of BLM Surface Management Regulations on Exploration and Mining Operations*, 28 Rocky Mtn. Min. Law Inst. 509, 562 n.241 (1983) (emphasis added).

Indeed, the BLM assumes the applicability and regularly takes state environmental and permit regulation into account in administering the 1872 Mining Act.[28] It is not surprising then that when the BLM adopted its own surface protection regulations in 43 C.F.R. §§ 3809-3809.6—which are identical in structure and which were specifically patterned after those of the Forest Service, 45 Fed. Reg. 78903, 78906 (1980)—BLM was quick to state that "[n]othing in [these regulations] shall be construed to effect a preemption of state laws and regulations relating to the conduct of operations or reclamation on Federal lands under the

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surface coal mining on federal land. See Surface Mining Control and Reclamation Act, 30 U.S.C. §1273(c).

[28] Thus, state environmental controls are one cost factor considered by BLM in determining whether a miner has located a "valuable mineral" under the 1872 Mining Act and is entitled to a patent or possesses a valid mining claim. See *United States v. Kosanke Sand Corp.*, 80 Interior Dec. 538, 546 (1973); *United States v. Pittsburgh Pacific Co.*, 84 Interior Dec. 282, 290-291 (1977). The failure to obtain state permits for mining activities is a reason for issuing a miner a notice of noncompliance with BLM's surface protection regulations. *Bruce W. Crawford Et. Ux.*, 92 Interior Dec. 208, 235 (1985). And the presence of state environmental regulation is a reason for the Interior Board of Land Appeals' rejection of Forest Service environmental objections to mining activities on lands withdrawn for powersite purposes. *U.S. Forest Service v. Milender*, 92 Interior Dec. 175, 183-184 (1985).

mining laws." 43 C.F.R. § 3809.3-1. BLM's comments in the rulemaking proceeding for the surface protection regulations also demonstrate its view that the 1872 Mining Act preserves concurrent state authority for environmental regulation of mining activities on federal land.[29]

C. State Environmental Regulation, Like That Under The Coastal Act, Does Not Frustrate Any Purposes or Objectives of The 1872 Mining Act

The 1872 Mining Act does encourage the private exploitation of minerals in the public domain. But the fact that state environmental regulation may make private mining more expensive or difficult is not sufficient to find that Congress intended to preempt such regulation. The argument sweeps too broadly because then *any* state regulation that imposes economic burdens on mining—whether it be supplemental work or recording requirements or taxation—would also be preempted. Indeed, the imposition of additional economic costs upon a regulated party is almost an inevitable consequence whenever Congress devises a system of dual federal and state regulation, as it has done under the 1872

[29] BLM's proposed § 3809.3-1 had stated that the Secretary of Interior would review state reclamation laws and that if state laws "afford general protection of environmental quality and values *at least as stringent* as would occur under exclusive application of [BLM's] regulations," then compliance with state laws would be a necessary condition for BLM approval of plans of operation. 45 Fed. Reg. 13964 (1980). (Emphasis added.) BLM then received comments questioning whether states had jurisdiction over mining activities on federal lands. In reply, BLM stated that, "it has been the view of the Department of the Interior that under section 3 of the 1872 Mining Law [30 U.S.C. § 26], the States may assert jurid sdiction over mining activities on Federal lands in connection with their own State laws. This may be done as long as the laws of the State are not in conflict or inconsistent with Federal law." 45 Fed. Reg. 78906 (1980); see also 45 Fed. Reg. 78903 (noting that "since part of the authority the states have to regulate mining activity is delegated by Congress in the mining law, that delegated authority serves as one basis for possible State/Federal agreements for the uniform implementation of their respective surface protection regulations.")

Mining Act. Cf. *Jones v. Rath Packing Co.*, 430 U.S. 519, 548 n.6 (1977), (Rehnquist, J., concurring and dissenting).

Moreover, in *Commonwealth Edison Co. v. Montana*, *supra*, 453 U.S. at 633-634, the Court rejected a similar claim that a state tax on coal being mined by federal lessees frustrated Congressional policy in a number of statutes of encouraging the production and use of coal. While agreeing that there was a federal policy encouraging coal mining, the Court found that such a general policy was not indicative of a Congressional intent to oust all state regulation that may have an adverse impact on coal development. *Id.*; see also *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 221-222 (1983) (despite Atomic Energy Act purpose to promote nuclear power, state regulation that undercut that objective was not preempted); *Silkwood v. Kerr-McGee Corp.*, *supra*, 464 U.S. at 257 (same).

While the 1872 Mining Act *allows* mining on federal land, it does not *require* it, or even guarantee that it occurs after valuable minerals are discovered. Granite Rock could simply perform the necessary annual assessment work and then hold its claim for speculative purposes without doing any mining; and its exclusive possessory rights under 30 U.S.C. § 26 would bar anyone else from mining the lands subject to its claims. Thus, because the 1872 Mining Act does not *itself* guarantee that mining will ever occur or be carried out, state regulation—even if it restricted mining—would not frustrate federal objectives. Cf. *Hayfield Northern Railroad Co. v. Chicago and Northwestern Transportation Co.*, *supra*, 467 U.S. at 635-636 (although Congress sought to allow rail carriers to abandon lines to recover economic opportunity costs, federal regulation does not allow recapture of opportunity costs in all situations, and consequently state regulation that impedes opportunity cost recapture is not preempted).

Moreover, Granite Rock's frustration argument is premised on an overly restrictive identification of federal regulatory objectives. While one of the 1872 Mining Act's purposes was encouraging private mining, the Act, like other 19th Century land grant acts, also had the objective of transferring federal lands into private

hands as a way of settling the West.[30] Thus, the necessary and inevitable consequence of this land disposal policy or objective was that private mining would be governed solely by state regulation. Indeed, since it was generally assumed by the 1872 Congress that miners would obtain patents after discovering valuable minerals, it was sensible to require miners to comply with state rules for working mines, easements, drainage and the like even prior to the patent stage. See 30 U.S.C. § 43. Moreover, federal mining policy, as reflected in the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a, and the National Materials and Minerals Policy, Research and Development Act of 1980, 30 U.S.C. § 1602, also includes minimizing the adverse environmental effects of mining. These federal policies of transferring mineral lands into private ownership and minimizing environmental impacts of mining either presume the existence of, or are furthered by, state regulation. Thus, given the variety of objectives underlying federal mining policy, one of those policies should not be singled out and given primacy over all the others when Congress has not done so in the legislative scheme it enacted.

Properly characterized, the 1872 Mining Act merely provides certain incentives for private mining, which are 1) giving miners property rights in federal land after valuable minerals are located; 2) offering patents for a nominal sum; and 3) waiving any claims for mining royalties. But surely one of the incentives was not an immunity from all state regulation. If it was, then Congress choose the wrong type of program—patenting out into private ownership mineral lands for a nominal sum—which had the exact opposite effect and end result of rendering all mining subject solely to state regulation.

The notion that state regulation must be preempted because it impermissibly interferes with federally-granted mining rights under the 1872 Mining Act is also unavailing. Federally-granted

[30] Senate Bill 257, which became the 1866 Mining Act after its language was incorporated into another bill, was entitled "A bill to legalize the occupation of the mineral lands and to extend the right of preemption thereto." See Cong. Globe, 39th Cong., 1st Sess., 1866, p. 3454.

rights under the Act—which are essentially property rights granted by the federal landowner to the miner—are not granted free of any state regulation. Rather, such rights are themselves qualified, conditioned, and partly defined by state law criteria.[31] Indeed, Congress made a deliberate decision in the 1866 mining legislation to grant federal mineral entitlements largely in accordance with state and local mining rules, rather than by a wholly new independent system.[32] Where Congress has indicated that federal rights are not unqualified and are not wholly independent of state law criteria, supplemental state conditions for the receipt of federal entitlements or the exercise of federally-granted rights, are not preempted. See *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 421-422 (1973), *Brown v. Hotel & Restaurant Employees & Bartenders*, 104 S.Ct. 3179, 3187-3190 (1984).

To be sure, there are limits to state regulation. A state attempt to absolutely prohibit all exploration and mining, for example, would be tantamount to a withdrawal of federal lands that would undoubtedly conflict with Congress' decision to open federal mineral lands to entry. But even those courts which have struck down excessively prohibitory applications of state regulation have concluded that reasonable non-prohibitory regulation is valid. See *Brubaker* v. *Board of County Commissioners*, 652 P.2d 1050, 1055-1056, 1058-1059 (Colo. 1982); *Elliott* v. *Oregon Interna-*

[31] See 30 U.S.C. §§ 22 (federal permission to enter federal lands for exploration granted "according to the local customs or rules of miners in the several mining districts"), § 26 (federal right of exclusive possession granted "so long as [miners] comply with state, territorial and local regulations"); § 43 (states "may provide rules for working mines" which may be conditions of sale expressed in patents); see also that state environmental controls are part of the calculus for determining whether a "valuable mineral" has been discovered which is the basis for a valid claim and the right to a patent.

[32] There is nothing anomalous about incorporating state rules for the utilization or disposition of a resource on the public domain. Water, another public domain resource, has long been subject to state rules for its disposition and utilization. See *California v. United States*, *supra*, 438 U.S. at 656-663.

tional Mining Co., 60 Ore. App. 474, 654 P.2d 663, 667-668 (1982). Because this is a purely facial challenge, there is no need in this case to define the precise limits of permissible state regulation. If particular applications of state regulation go too far, a judicial remedy is always available to correct any excess and to protect any federal mining rights based on a developed record for review. The claim here is that *any* permit regulation, regardless of substance, is *per se* in conflict with the 1872 Mining Act. That proposition finds no support in the Act's language, its legislative history, case authority, or BLM's administrative practice.

II

THE FOREST SERVICE REGULATIONS DO NOT PREEMPT COASTAL ACT PERMIT REGULATION

A. The Forest Service Regulations Incorporate and Rely on Supplemental State Environmental Regulation Rather Than Exclude It

The language of the Forest Service regulations, the Forest Service's practice in applying them, and the Forest Service's explicit statements in approving Granite Rock's plan of operations establish that the regulations were not intended to preempt state environmental regulation like that under the Coastal Act.

The regulations are replete with provisions sanctioning the application of state police power laws to mining operations. See 36 C.F.R. §§ 228.8(a), 228.8(b), 228.8(c), 228.9, 228.11. The regulations provide not that the *Forest Service* has discretion to selectively incorporate state law criteria in its approval of a mining plan, but that the *mining operator* "shall comply" with state standards and laws. Moreover, by providing that state "certification[s]" or "approval[s]" of compliance with state laws may be accepted as satisfaction of "similar or parallel requirements of these regulations," *id.*, § 228.8(h), the Forest Service regulations *necessarily* presume the existence of independent state permit systems. Section 228.8(h) cannot function and has no meaning unless states can issue permits (or certifications or approvals) based on independently-effective state law criteria that parallel the very criteria in the Forest Service regulations. It would be

incongruous for the Forest Service to require miners to comply with state law and to provide for state approvals as a way of satisfying federal criteria, and then preempt state permit authority which is the very means for attaining those objectives. *Jones* v. *Rath Packing Co.*, *supra*, 430 U.S. at 531 n.18; see also *New York State Dept. of Social Services* v. *Dublino*, *supra*, 413 U.S. at 419-420.

The Forest Service's practice of entering into formal agreements with states that provide for coordination of dual federal and state environmental regulation and acceptance of state approvals in lieu of federal ones, see *supra*, pp. 11-12, is wholly inconsistent with the idea that Forest Service regulation is exclusive. See *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 209 (1944).

There are very practical reasons why the Forest Service relies on state regulation to assist in protecting the federal forests. The limited resources and enforcement capability of the Forest Service,[33] coupled with the obviously complementary nature of state

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[33] The Congressional Office of Technology Assessment notes in *Management of Fuel and Nonfuel Minerals in Federal Land* (1979) that it is "in a practical sense impossible" for the Forest Service to ensure compliance with its surface protection resources. "Each ranger district . . . can encompass millions of acres, and only one or a few persons, if any, will be available and qualified to administer and enforce the regulations", p. 196. See also, *Hardrock Mining on the Public Land*, Council on Environmental Quality (1977), p. 19. ("[e]nforcement of the mining regulations has stretched Forest Service personnel very thin, especially in . . . Idaho, Montana, Nevada, Utah, Wyoming and Colorado; for example, on the Toiyabe National Forest, Nevada, Austin District, one District Ranger is responsible for overseeing 1.4 million acres of land.").

A 1986 General Accounting Office report also notes that BLM's enforcement of its surface protection regulations has been limited and ineffective. See GAO/RCED 86-48, *Ensuring Against Abuses From Hardrock Mining*. According to the GAO report, "BLM's Winnemuca, Nevada, office, for example, has more than 500 hardrock mining operations scattered over the 8 million acres in its district and has designated two staff geologists to inspect the sites in addition to their other duties." *Id.*, p. 24. A GAO sample of 556 mining operations in the West that began in 1981 revealed that more than half of the operations

environmental regulation, means that a vigorous state regulatory role furthers the Forest Service's own purposes. See generally *California v. Zook*, 336 U.S. 725, 737 (1949); *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 446 (1963), (Brennan, J. concurring). Moreover, state personnel may have special expertise in certain fields which justifies reliance on state regulation.[34]

The circumstances attending adoption of the Forest Service regulations also argue against any preemptive intent. The Forest Service had no surface protection regulations for mining until 1974. Prior to that time, the states filled the void and supplied the environmental and mining reclamation regulation. Indeed, the mining industry argued against the need for Forest Service regulation precisely because state environmental regulation was already supplying the necessary controls.[35] Moreover, the Forest Service had entered into at least one pre-1974 agreement with a state that provided for Forest Service participation in that state's environmental regulation of mining activities on federal forest land. See *supra*, p. 10 n. 13. In these circumstances, the Forest Service surely would have made its preemptive intent plain if it

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had never been inspected by BLM four years later. *Id.*, pp. 3, 23-24. Moreover, a number of sites had been abandoned without any reclamation, and left behind were waste piles, containers of sulfuric acid and caustic chemicals, ponds containing cyanide, rusting mining equipment, and pits and craters scarring the landscape. *Id.*, pp. 24-27. The miners were not expected to return, could not be contacted, or had gone into bankruptcy, and the BLM had no plans for any reclamation. *Id.*, pp. 3, 24-25, 29-31. In responding to GAO's criticisms of its regulation, the BLM noted that state regulation provides environmental controls in addition to those of BLM and that such state controls should also be taken into account in assessing environmental regulation of mining. *Id.*, pp. 40, 44; see also p. 28.

[34] See, for example, in this case, the Forest Service relied on consultation with the California Department of Fish and Game and the Regional Water Quality Control Board regarding endangered species and water quality impacts. See *supra*, p. 13 n. 18.

[35] See Dempsey, *supra*, p. 483-484; *Hard Rock Mining on the Public Land*, *supra*, p. 29.

had intended to displace such preexisting state regulation. Yet the Forest Service's environmental impact statement for its regulations indicates that the Service contemplated and was untroubled by a system of dual federal and state regulation that would result after adoption of the regulations.[36]

The Forest Service's approval of state permit regulation was also manifest in its processing of Granite Rock's plan of operations. Both the Forest Service's modifications to the plan and its decision approving the plan expressly provide that Granite Rock shall obtain necessary state permits. The Forest Service's environmental assessment is even more specific in stating that Granite Rock is responsible for obtaining any necessary permits from the Coastal Commission.

That the Forest Service should direct miners to comply with state police power permit regulation is understandable given the nature of the Forest Service's own statutes. The Organic Administration Act of 1897, 16 U.S.C. § 480, expressly preserves state civil jurisdiction within the national forests. See *United States* v. *County of Fresno*, 429 U.S. 452, 455 (1977); *Wilson* v. *Cook*, 327 U.S. 474, 486-487 (1946). 16 U.S.C. § 551a also authorizes the Forest Service "to cooperate with any State or political subdivision thereof . . . in the enforcement or supervision of the laws or ordinances of a State . . . " in connection with regulating the use of national forests.

In sum, the lack of any preemptive intent is demonstrated both by the structure of the Forest Service statutes and the substance of the regulations—which contemplate cooperative action with the states, see *Askew* v. *American Waterways Operations*, 411 U.S. 325, 332 (1973); *Rice* v. *Chicago Board of Trade*, 331 U.S. 247, 255 (1947), and by the Forest Service's actual practice in administering its regulations—which assumes the applicability of state permit requirements, see *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 387-388 (1983).

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[36] See Brief of the State of Alaska, et al. as amici curiae in support of appellants' jurisdiction statement, p. 30, n.4.

When federal agencies have intended their regulations to be preemptive they have had no difficulty in expressly so stating. Compare *Capital Cities Cable Inc.* v. *Crisp*, 467 U.S. 691, 702-703 (1984); *Fidelity Federal Savings & Loan Assn.* v. *De La Cuesta*, 458 U.S. 141, 147, 154 (1982). Accordingly, the Court has cautioned that "because [federal] agencies . . . can speak through a variety of means, including regulations, preambles, interpretive statements and responses to comments, *we can expect that they will make their intentions clear* if they intend for their regulations to be exclusive." *Hillsborough County, Florida* v. *Automated Medical Laboratories*, 105 S.Ct. 2371, 2377 (1985) (emphasis added). Requiring a clear statement of federal agency intent to preempt is desirable for a number of reasons. Such a clear statement rule not only avoids uncertainty and needless litigation over the import of agency silence, but it ensures that federal agency preemption decisions are based on a deliberate reasoned judgment made after an opportunity for a dialogue with affected state agencies. A clear statement rule is particularly appropriate in this case where there is no apparent reason why the federal agency would have wanted to oust state environmental regulation, and compelling reasons why the agency would want to retain it.

B. There Is No Actual Conflict Between Coastal Act Permit Regulation and the Forest Service Regulations

There is no finding by the Ninth Circuit nor any evidence that it would be physically impossible for Granite Rock to obtain both a coastal permit and Forest Service approval of its plan of operations; nor is there any showing that any coastal permit conditions might prevent Granite Rock from complying with Forest Service requirements in the plan of operations. See generally *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142-143 (1963). Since Granite Rock has not yet applied for a coastal permit, whether Coastal Act regulation, as applied, may actually conflict with any Forest Service requirements is not ripe on this record. But because the Coastal Commission has substantial flexibility in tailoring any permit conditions to avoid any conflict with Forest Service requirements, see Cal. Pub. Resources Code § 30607, and because the Forest Service can modify existing plans

of operation, 36 C.F.R. § 228.4(e), there is flexibility to avoid either conflicts between state and federal requirements or unnecessary burdens on the miner.

There is no question that Forest Service and Coastal Act regulation are directed at similar objectives of minimizing adverse environmental impacts and protecting surface resources from unnecessary degradation. That the Forest Service's surface protection objectives would be served by precluding further state regulation directed to the same ends is implausible, and there is no showing that more stringent state requirements would interfere with any Forest Service objectives of any kind. Where federal and state regulatory objectives are so clearly complementary and harmonious, more stringent state requirements do not conflict with federal regulatory interests. See *Brown* v. *Hotel & Restaurant Employees & Bartenders, supra*, 104 S.Ct. at 3190.[37]

There is also no conceivable federal interest in precluding state regulation to ensure national uniformity. Environmental regulation of mining impacts in widely differing geographic settings is a subject matter uniquely suited to non-uniform local regulation.

The Ninth Circuit's sole rationale for implying preemption was its belief that the Forest Service must balance or "fine tune" the federal interest in resource protection against the federal interest in promoting mining, and that that any state permit regulation

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[37] Insofar as state permit conditions may be *identical* to those of the Forest Service, supplemental state enforcement of federal criteria cannot possibly create any conflict, particularly given the Forest Service's limited enforcement capability. See *California* v. *Zook, supra*, 336 U.S. at 735-737; *Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U.S. 714 (1963). Moreover, there may be other resource values which the Coastal Commission may seek to protect, or other off-site or spill-over environmental effects on non-federal land—such as mine tailing pollution and road cut erosion into the Little Sur River, a designated protected waterway under state law—which may be of little or lesser concern to the Forest Service. Thus, supplemental state regulation is not rendered superfluous by Forest Service regulation, but is necessary to protect legitimate police power interests of the state that may not be protected by the Forest Service.

undermined this balancing and hampered the Forest Service's ability to maintain the "reasonableness" of environmental measures. J.S. App., A-9-10.

The Ninth Circuit read far more into the Forest Service regulations than they can bear. The Forest Service regulations on their face disclaim any purpose "to provide for the management of mineral resources" and acknowledge that that is the responsibility of the Department of the Interior. 36 C.F.R. § 228.1; see also Forest Service Manual §§ 2817.03, 2817.23 (1983). Thus, the notion that the Forest Service must delicately balance mining promotion and resource protection objectives is illusory. Significantly, the federal agency which *is* charged with promoting mining and managing federal mining policy—the Department of the Interior—acknowledges that state environmental regulation is fully preserved under the 1872 Mining Law. *Supra* at 25-26.

While the Forest Service regulations take into account the economic burdens on miners in determining the "reasonableness" of surface protection measures, see 36 C.F.R. § 228.5(a), that unexceptional provision was included to assuage mining industry concerns about cost burdens, see 39 Fed. Reg. 26038 (1974), and to minimize the risk of legal challenges to the new regulations and the litigation burdens of enforcing them.[38] If preemption was implied every time a federal agency sought to accommodate the regulated industry by providing that its regulation would be "reasonable" in application, there would not be much room for any state regulation. "Reasonable" Forest Service conditions do not set an absolute ceiling on environmental and surface protection measures because the Forest Service's cooperative agreements with the states and local governments expressly

[38] See *Hardrock Mining on the Public Land, supra*, p. 18 ("By its own admission, the Forest Service has moved very cautiously in enforcing these regulations and has gone to considerable lengths to avoid litigation"); *Management of Fuel and Nonfuel Minerals in Federal Land, supra*, p. 195; Noble, *Environmental Regulation of Hardrock Mining on Public Lands: Bringing the 1872 Law Up to Date*, 4 Harv. Environ. Law Rev. 145, 155 n.77 (1980); see also Forest Service Manual § 2817.03 (1983) ("securing the willing cooperation of prospectors and miners" is the "primary means for obtaining protection of surface resources.").

acknowledge "*more stringent*" state permit requirements, see J.S. App., A-111, and state approvals that "meet *or exceed*" Forest Service standards. *Id.*, A-90, A-115, A-119, A-123, A-127, A-131 (emphasis added).

By treating the Forest Service's fashioning of "reasonable" environmental conditions as an implicit judgment to exclude any state permit requirements, the Ninth Circuit ignored the fact that the Forest Service *did* address the question of state permit requirements in approving Granite Rock's plan and concluded that Granite Rock should obtain state permits, including a coastal permit. Thus, the Forest Service's "reasonableness" calculus was more likely based on the assumption that state regulation was a given and would apply, rather than that it had to be excluded in order for Forest Service regulation to be "reasonable."

While Forest Service regulation has "reasonable" limits in the sense that it may not completely deprive miners of their mining rights under the 1872 Mining Act, one can always find some legal dimension against which federal regulation must be "reasonable". That such "reasonableness" limits do not compel preemption is plainly illustrated by the BLM surface use regulations, 43 C.F.R. §§ 3809-3809.6, which are subject to identical "reasonableness" constraints yet contemplate independent state environmental regulation.

The assumed unreasonableness of dual federal and state regulation also overlooks the fact that valid claim holders, like Granite Rock, can always avoid dual regulation simply by obtaining a patent. Once the lands are patented, they are no longer subject to any Forest Service requirements. If valid claim holders choose not to obtain patents, then the Forest Service and the states, through their cooperative agreements, have minimized dual regulatory burdens through the use of a single reclamation bond, see J.S. App. A-93-94, A-98, A-105-106, A-109-110, and single reclamation plan requirements, *id.*, A-90, A-97, A-102, A-115, A-119, A-123, A-127, A-131. Because the structure of the 1872 Act and the cooperative system devised by federal and state agencies provide mechanisms for avoiding unreasonable duplicative regulatory burdens, the Ninth Circuit need not have devised its own drastic preemption solution for an administrative coordination matter

that has already been addressed and handled by the relevant agencies.

Insofar as the Ninth Circuit was disturbed by the permit form of state regulation, there is nothing in the 1872 Mining Act, the Forest Service regulations or the Forest Service's own organic legislation that distinguishes between state permit or non-permit regulation, or which indicates that the former is somehow impermissible. Indeed, the distinction has no meaning in this case since the Coastal Commission acknowledges that it cannot deny a permit in order to prohibit all mining by Granite Rock. The permit is merely an administrative vehicle for attaching non-prohibitory environmental conditions for mining, and it is a form of state regulation expressly contemplated by the Forest Service regulations. See 36 C.F.R. § 228.8(h).

III

THE NINTH CIRCUIT'S *PER SE* RULE OF NO DUAL FEDERAL AND STATE PERMITTING EVEN WHEN FEDERAL REGULATION HAS NOT OCCUPIED THE FIELD IS ERRONEOUS

The Ninth Circuit's preemption analysis is fatally flawed. What the court of appeals did, in a nutshell, was find that the Forest Service regulations "do not . . . occupy the field of establishing environmental standards" for mining, J.S. App., A-9, and then go on to invalidate Coastal Act regulation by applying none other than an occupation of the field analysis. Thus, the court's inquiry was "whether federal law establishes authority in a federal agency to prohibit or permit mining in national forests conditioned on meeting environmental protection standards and, if so, whether state permit authority . . . intrudes into that sphere of authority." *Id.*, A-8-9. This is a classic "occupation of the field" analysis. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947); *Pacific Gas & Electric* v. *State Energy Resources Conservation & Development Commission*, *supra*, 461 U.S. at 212-213.[39]

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[39] Indeed, the Ninth Circuit derived its preemption test largely from *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*,

(Footnote 39 continued on following page)

While the Ninth Circuit spoke in terms of a state permit system "undermin[ing] the Forest Service's . . . permit authority," J.S. App., A-9, its operative concept was one of an *inherent* conflict arising simply from dual federal and state permit regulation, which is an occupation of the field concept. To be sure when Congress or a federal agency does intend to occupy the field, any state regulation, even though it be coincident or complementary, is ousted. But there are many instances in our complex society where activities may be subject to both federal and state permit requirements, and where dual regulation or permitting based on similar criteria does not offend the Supremacy Clause.[40]

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328 U.S. 152 (1946) and *Pacific Gas & Electric*, *supra*,—two occupation of the field cases.

[40] For example, that the U.S. Army Corps of Engineers has issued a permit for dock construction in navigable waters of the United States does not preclude a state from also requiring a permit for the project, *Cummings* v. *Chicago*, 188 U.S. 410, 431 (1903); nor does federal licensing of customhouse brokers prohibit a state from requiring a license to do business within the state, *Union Brokerage Co.* v. *Jensen*, *supra*, 322 U.S. at 207-208; nor does federal licensing of marine terminal facilities preclude state licensing of such facilities on similar environmental grounds, *Askew* v. *American Waterways Operators Inc.*, *supra*, 411 U.S. at 337; nor does federal licensing of Indian traders on Indian Reservations preclude state liquor licensing of such traders, *Rice* v. *Rehner*, 463 U.S. 713 (1983); nor does certification of a commodity under federal marketing orders preclude a state from imposing additional state certification requirements, *Florida Lime & Avocado Growers* v. *Paul*, *supra*, 373 U.S. 132; nor does federal licensing of blood plasma vendors preclude a state from imposing additional operating requirements on such vendors, *Hillsborough County Florida* v. *Automated Medical Laboratories*, *supra*, 105 S.Ct. 2371 (1985); nor does federal licensing of vessels preclude imposition of state smoke emission requirements on such vessels, *Huron Portland Cement* v. *Detroit*, 362 U.S. 440 (1960); nor does issuance of a Forest Service permit for fish traps anchored on Forest Service land preclude the application of state conservation laws, *Kake Village* v. *Egan*, 369 U.S. 60 (1962). As stated in *Kake Village*, *supra*, the Forest Service permit does not "grant[ ] a right to be free of state regulation . . . Like a certificate by the Interstate Commerce Commission [i]t is simply acknowledgment that the activity

(Footnote 40 continued on following page)

The crucial preemption inquiry is not whether a federal agency exercises permit authority on a particular subject on which a state also seeks to regulate, but whether Congress or the federal agency intended federal permitting authority to be *exclusive*. The notion that the "coincidence" of federal and state regulation automatically leads to preemption was rejected long ago. *California* v. *Zook*, *supra*, 336 U.S. at 730-372; see also *Florida Lime & Avocado Growers* v. *Paul*, *supra*, 373 U.S. at 142. Thus, the predicate for what the Ninth Circuit called the "*First Iowa* doctrine", is an intent to *eliminate* dual regulation or to "occupy the field"—not simply a coincidence or overlap of federal and state permitting. Here, the Forest Service regulations incorporate state regulatory requirements and rely on state permit review as a functional equivalence mechanism; the Forest Service legislation, 16 U.S.C. §§ 480, 551a, preserves state civil jurisdiction and authorizes Forest Service cooperation in enforcing state law; and the 1872 Mining Act is replete with provisions authorizing state regulation. Accordingly, the Ninth Circuit's conclusion about the absence of any federal occupation of the field in this case is not only undeniable, but it renders the *First Iowa* doctrine inapplicable.

Moreover, there is no evidence nor any finding by the Ninth Circuit that it is impossible for a miner to obtain both federal and state permits; or that any coastal permit conditions might conflict with, or prevent a miner from complying with Forest Service criteria; or that the surface protection purpose of the Forest Service regulations would be frustrated by additional state environmental protection. In short, there is no basis for any finding of an actual conflict in this case other than the Ninth Circuit's notion of an inherent conflict arising from dual regulation.

The preemption rule announced by the Ninth Circuit—that there can be no dual federal-state permit review of an activity even when there is no federal occupation of the field and even when no actual conflicts with federal policy or objectives are demonstrated—is an erroneous preemption rule. Such a *per se*

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does not violate federal law, and not an exemption from state licensing or police power requirements." *Id.* at 63.

rule could well invalidate a host of state permit regulation to satisfy an implied preemption purpose "which would be only the product of [a] Court's imagination", *California v. Zook*, *supra*, 336 U.S. at 732-733.

State permit requirements are not being applied here to federal facilities or activities, see *Hancock v. Train*, 426 U.S. 167 (1976); *EPA v. State Water Resources Control Board*, 426 U.S. 200 (1976), but to a private person carrying out purely private activities on federal land. Accordingly, the principle that state permit regulation must be expressly authorized by Congress—which protects the federal government's immunity and applies when federal facilities are being regulated, see *Hancock v. Train*, *supra*, 426 U.S. at 179—has no place here. Rather, the operative presumption is the exact opposite, namely that states retain police power authority to regulate private activities on federal land unless and until Congress exercises its Property Clause power to displace such state regulation through enactment of conflicting federal regulation. See *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976); see also *McKelvey v. United States*, 260 U.S. 353, 359, 360 (1922); *Omaechevarria v. Idaho*, 246 U.S. 343, 346 (1918). Rather than displace state regulation, Congress has authorized state police power regulation of private mining in the 1872 Mining Act, preserved state jurisdiction over the national forests in 16 U.S.C. § 480, and authorized the Forest Service to cooperate in enforcing state laws in 16 U.S.C. § 551a, which the Forest Service has done by entering into a host of agreements with the states that recognize state environmental regulation of private mining on national forests.

Insofar as the Ninth Circuit relied on *Ventura County v. Gulf Oil Corporation*, 601 F.2d 1080 (9th Cir. 1979), *aff'd. mem.*, 445 U.S. 947 (1980), that case is both distinguishable and subject to question in light of subsequent decisions by this Court.[41]

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[41] This Court's summary affirmance of the *Ventura* judgment is an affirmance of the result and not necessarily the reasoning of the court of appeals. See, e.g., *Pacific Gas & Electric Co.*, *supra*, 461 U.S. at 212 n.24.

First, *Ventura* involved an entirely different mining regime under the Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-263, which has a different historical background and which implicates a different set of federal interests. The 1872 Mining Act establishes a "locational" mining system whereby prospectors are free to enter the public domain, locate valuable hardrock minerals and obtain fee title to the land from the government for a nominal sum. Like the Homesteading and Railroad grant acts, the 1872 Mining Act was one aspect of national policy in the Manifest Destiny era favoring the transfer of the public domain and its resources into private hands as a way of settling the West.

By 1920 however, the national philosophy had changed. The Conservation movement led to the view that federal land and mineral resources were finite and should be carefully managed and conserved. In place of the laissez-faire locational system for hardrock minerals under the 1872 Act, a detailed leasing system for fossil fuel minerals under the 1920 Leasing Act was adopted which "represented a decisive departure from the philosophy of the location laws," 1 *American Law of Mining*, Rocky Mtn. Law Foundation, § 1.28, p. 86 (1983); see also *Wilbur v. Krushnic*, *supra*, 280 U.S. at 314 (1920 Leasing Act "effected a complete change of policy" from the 1872 Mining Act). While the 1872 Act left the public domain "free and open to exploration and purchase" subject to state and local rules, 30 U.S.C. § 22, the 1920 Act delegated to the Secretary of the Interior discretionary authority to issue oil and gas leases in accordance with detailed criteria. See 30 U.S.C. § 226. Unlike the 1872 Mining Act, which grants minerals to private parties without payment of royalties and provides for the complete disposal of federal land title, the 1920 Leasing Act does not allow for purchase of the land and requires payment of rents and royalties to the federal government, 30 U.S.C. § 226(b), (c), (d), which can be received in kind as a percentage of the oil and gas produced, 30 U.S.C. § 192. While miners under the 1872 Act control the extent of any mineral development, the federal government *requires* lessees under the 1920 Act to exercise due diligence in prospecting and development, and can cancel leases for lack of diligence, 30 U.S.C. §§ 183, 187. In short, under the 1920 Act, the federal government is just as much an interested miner as the private lessee since the

government obtains royalties and a percentage of the minerals produced. The crux of the *Ventura* holding is that a local government attempt to prohibit mining by a government lessee actually conflicts with dominant federal interests in securing royalty payments and ensuring marketability of federal leases—federal interests which are totally absent under the 1872 Mining Act. Because preemption turns on the unique features of the particular regulatory program involved, *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 638 (1973), the *Ventura* conclusion with respect to preemption under the 1920 Leasing Act has no application here.[42]

Second, insofar as the *Ventura* decision is based on the notion that state regulation is preempted because it frustrates a general federal policy of encouraging mining under the 1920 Leasing Act, that rationale is questionable in light of this Court's decision in *Commonwealth Edison Co. v. Montana*, *supra*, 453 U.S. 609.

Moreover, from the posture of the case, it appears as if the local government in *Ventura* sought to prohibit or veto all mining. Because the Coastal Commission does not seek to prohibit or veto all mining, the potential for conflict here is entirely different than in *Ventura*. Insofar as the *Ventura* court simply treated *any*

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[42] For the same reason, *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, *supra*, 328 U.S. 152 and *Sperry v. Florida*, 373 U.S. 379 (1963)—upon which the Ninth Circuit also relied, J.S. App. A-7 and which involve entirely different federal regulatory programs—do not support any finding of preemption under the statutes and regulations involved in this case. There is simply no "*First Iowa* doctrine" which precludes dual permitting as a general matter. Depending upon the scope of the field occupied by federal regulation, and whether permitting criteria are mutually exclusive, dual permitting may or may not be permissible under different regulatory regimes. This Court had no difficulty distinguishing *First Iowa* and limiting it to its facts in *Pacific Gas & Electric*, *supra*, 461 U.S. at 223 n.34. Moreover, *First Iowa's* restrictive interpretation of statutes preserving state water rights authority and its broad statements about an ouster of state permit requirements may be questionable in light of *California v. United States*, *supra*, 438 U.S. 645. Compare 328 U.S. at 175-176 and n. 20, with 438 U.S. at 664-670.

permit requirement as being tantamount to a "veto", such a characterization is untenable. A permit system, after all, assumes that permission for an activity may be given and will not always be denied. See *United States v. Riverside Bayview Homes*, 106 S.Ct. 455, 459 (1985).[43] The fact that conditions may be included in a coastal permit also does not amount to a "veto" of the mining or of the Forest Service's plan of operations, cf. *Escondido Mutual Water Co. v. LaJolla Bands of Indians*, 466 U.S. 765, 776-778 (1984), particularly when there is no showing that Granite Rock cannot comply with such conditions. In sum, the fact that the Coastal Commission seeks to have Granite Rock obtain a permit should not be treated in law or in fact as an attempt to "veto" or prohibit all mining, and insofar as *Ventura* provides otherwise, it is incorrect.

IV

THE NINTH CIRCUIT'S PREMATURE CONCLUSION ABOUT A CONFLICT BETWEEN STATE AND FEDERAL REGULATION VIOLATES THE RIPENESS DOCTRINE

Because this case involves only a facial challenge to Coastal Act regulation, the question whether Coastal Act regulation will actually conflict with Forest Service regulation or private mining rights is not presently ripe. By reaching out and concluding that state permit regulation must be deemed to necessarily conflict with Forest Service authority and objectives, the Ninth Circuit violated some basic ripeness and prudential limitations of Supremacy Clause jurisprudence.

This Court has repeatedly emphasized that alleged preemption conflicts must be real, actual in fact, and irreconcilable, e.g.

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[43] The overwhelming number of coastal permit applications are approved as a general matter. See 1979-80 *Biennial Report*, State of California, California Coastal Commission, p. 28 (95% of permit applications approved during 1979-80); 1980-85 *Five Year Report*, State of California, California Coastal Commission (forthcoming) (approximately 95% of permit applications approved during 1980-85).

Florida Lime & Avocado Growers v. Paul, supra, 373 U.S. at 141; *Goldstein v. California*, 412 U.S. 546, 553 (1973), and not merely speculative or hypothetical, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 131 (1978). "In this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin seeking out conflicts between state and federal regulations where none clearly exists,'" *id.* at 130, quoting *Huron Portland Cement* v. *Detroit*, 362 U.S. 440, 446 and *Seagram & Sons* v. *Hostetter*, 384 U.S. 35, 45. Courts "must be careful to distinguish those situations in which the concurrent exercise of a power by the Federal government and the States . . . *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise" *Goldstein* v. *California*, *supra*, 412 U.S. at 554-555 (emphasis in original). And, "whenever possible, [courts] should 'reconcile the operation of both statutory schemes with one another rather than [holding the state scheme] completely ousted.'" *Ray* v. *Atlantic Richfield*, 437 U.S. 151, 182-183 (1978), quoting *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 361.

Thus, this Court has often held that whether an actual preemption conflict exists cannot be determined until state regulation has been actually applied in a particular case, e.g. *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, *supra*, 461 U.S. at 389; *Pacific Gas & Electric* v. *Energy Resources Commission*, *supra*, 461 U.S. at 203; *Askew* v. *American Waterways Operators*, *supra*, 411 U.S. at 337; *Seagram & Sons* v. *Hostetter*, 384 U.S. 35, 46 (1966); "[f]or even action which seems pregnant with possibilities of conflict may as consummated, be wholly barren of it," *Rice* v. *Chicago Board of Trade*, *supra*, 331 U.S. at 256. Because the Coastal Act on its face does not prohibit all mining, and because the Coastal Commission has acknowledged throughout this litigation that it cannot prohibit all mining, California can and should be allowed to prudently construe and apply its regulation to avoid any actual conflicts with federal regulation. See particularly *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 161-162 (1952); *DeCanas* v. *Bica*, 424 U.S. 351, 363-365 (1976); *Askew* v. *American Waterways Operators*, *supra*, 411 U.S. at 331; *Seagram & Sons* v. *Hostetter*, *supra*, 384 U.S. at 46.

CONCLUSION

The judgment of the court of appeals should be reversed.

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APPELLEE'S

BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA COASTAL COMMISSION, et al.,
Appellants,

VS.

GRANITE ROCK COMPANY,
Appellee.

On Appeal from The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Does the extensive scheme of regulation established in the federal mining laws and Forest Service regulations preempt final state permit authority over Granite Rock Company's mining activities which are conducted on unpatented mining claims on federal lands pursuant to federal regulation and approval?

2. Does the Coastal Zone Management Act vest final authority over the subject federal lands in the federal government by excluding the subject lands from the coastal zone pursuant to 16 U.S.C. § 1453(1).

3. Is final state permit authority over the use of federal lands preempted by the Coastal Zone Management Act where Congress has clearly declared its intent to preclude such authority and where this authority impermissibly conflicts with the full purpose and objectives of Congress?

PARTIES

All Appellants are fully set forth in Brief for Appellants, p. ii. Appellee Granite Rock Company is a California corporation. Pursuant to United States Supreme Court Rule 28.1, 28 U.S.C. (1984), there are no parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Granite Rock Company.

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No. 85-1200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA COASTAL COMMISSION, et al.,
Appellants,

VS.

GRANITE ROCK COMPANY,
Appellee.

On Appeal from The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR APPELLEE

OPINIONS BELOW

The decision of the Court of Appeals is reported at 768 F.2d 1077 and is reprinted in the Appendix to Granite Rock Company's Motion to Dismiss or Affirm, A:1-10 ("G.R. App."). The decision of the district court is reported at 590 F.Supp. 1361, and is reprinted in the Appendix to the Jurisdictional Statement, A:11-32 ("J.S. App.").

JURISDICTION

A. The Appeal Should Be Dismissed As Appellate Jurisdiction Does Not Lie Under Section 1254(2)

Numerous decisions of this Court hold that appellate jurisdiction is proper only when a state statute is expressly invalidated. Jurisdiction does not lie where, as here, the state's exercise of authority is struck down without reference to a specific state statute. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 (1984). *See also Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174, 2181 n.12 (1985); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 42-43 (1983).

Here, the Court of Appeals did not strike down a specific provision of the California Coastal Act.[1] Rather, the Court of Appeals held that the California Coastal Commission's ("Coastal Commission") purported exercise of land use permit authority over Granite Rock Company's ("Granite Rock") mining activities on federal land was preempted. G.R. App. A:8-9. In fact there is no California Coastal Act statute imposing permit requirements on federal land, as these statutes only require permits for development *in* the coastal zone and federal lands are excluded from the coastal zone. *See* 16 U.S.C. § 1453(1) discussed in part V *infra*.[2]

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[1] The Court of Appeals' opinion did not identify a specific provision of the Act, but rather referred to the entire Act generally. *See, e.g.*, G.R. App. A:2. The Coastal Commission was subsequently unable to identify a specific statute as being invalidated by that decision. See Coastal Commission Brief for Appellants, pp. 1-6 ("C.C.B.").

[2] California Public Resources Code § 30604 provides that permits are not required for development outside the coastal zone. *See also* California Public Resources Code § 30008 which does not require state permits for development activities on federal lands.

Thus, there is no invalidation of a state statute providing the basis of a 28 U.S.C. § 1254(2) appeal.

In *Silkwood*, the Tenth Circuit disallowed punitive damages based on state law because of the preemptive effect of federal law. 667 F.2d 908, 923 (10th Cir. 1981). On review, this Court found § 1254(2) jurisdiction lacking, stating that statutes authorizing appeals are to be strictly construed and "[w]hile the award itself was struck down, the statute authorizing such awards was left untouched." 464 U.S. at 247.[3]

The Court of Appeals' decision in *Granite Rock* is analogous; the Court struck down the Coastal Commission's attempt to require a state permit to conduct federally authorized mining operations on federal lands, but left intact the statutes authorizing general permit authority in the state coastal zone. Here, the Court did not find that the statute expressly required or even authorized the attempted exercise of permit authority over federal lands.[4]

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[3] On page 4 of its Brief, the Coastal Commission erroneously relies on *California v. Grace Brethren Church*, 457 U.S. 393 (1982). That case involved a direct appeal under 28 U.S.C. § 1252, a statute which is construed more broadly than § 1254(2). See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 247 n.10; *McLucas v. DeChamplain*, 421 U.S. 21, 31 (1975).

[4] Cases relied on by the Coastal Commission (C.C.B., pp. 3-5) are either irrelevant or factually distinguishable. In *Franchise Tax Board v. U.S. Postal Service*, the Ninth Circuit had concluded that the California legislature had in certain statutes "unequivocally demonstrated its intention." 698 F.2d 1029, 1034 (9th Cir. 1983) (per curiam). On appeal, this Court recognized that, since the state statute required the Postal Service to honor orders to withhold, it followed as a "necessary predicate" that said state law was invalid under Art. VI, cl.2 of the Constitution as inconsistent with federal law. 104 S.Ct. 2549, 2551 n.7 (1984). It also is not controlling jurisdictionally that this Court exercised appellate jurisdiction in summarily affirming the preemption of state permit requirements in *Ventura County v. Gulf Oil Corp.*, 445 U.S. 947 (1980), *aff'g* 601 F.2d 1080 (9th Cir. 1979) and in *Minnesota v. Northern States Power Co.*, 405 U.S. 1035 (1972), *aff'g* 447 F.2d 1143 (8th Cir. 1971). *Sub silentio* jurisdictional rulings in prior decisions do not bind this Court when, as here, a subsequent case squarely raises the jurisdictional issue. *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974). Finally, those cases cited at C.C.B., p. 5 n.8 are irrelevant since they support the inapplicable statement that "[i]t is sufficient that state law

Accordingly, Granite Rock respectfully urges dismissal of this appeal for lack of jurisdiction.

B. Certiorari Should Be Denied

There also are no special and important reasons for granting *certiorari*. As demonstrated on pages 5-9 of Granite Rock's Motion to Dismiss or Affirm, the Ninth Circuit's decision does not conflict with decisions of this Court, nor with the decisions of any other federal Court of Appeals. On the contrary, the decision comports with well-settled preemption doctrine, and specifically with this Court's summary affirmance in *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.* 445 U.S. 947 (1980). *See also Skaw v. United States*, 740 F.2d 932, 940 (Fed.Cir. 1984).

Any inconsistencies between the Court of Appeals' decision and the cases from Idaho, Oregon and Wyoming[5] do not create an intolerable conflict or a question of sufficiently national scope to warrant *certiorari* review. None of the state cases involved, as this case does, federal lands under the federal Coastal Zone Management Act.

With these prudential considerations in mind, Granite Rock respectfully suggests the Court deny *certiorari*.

C. Justiciability: This Case Presents An Actual Conflict "Ripe" for Review

The limited issue in this case, whether the Coastal Commission's power to require an independent land use permit conflicts with and undermines federal final permit authority, is ripe for review. Only after Granite Rock's federally approved mining activities were into their third year did the Coastal Commission inform Granite Rock that it had to obtain a Coastal Commission permit or shut down. Certainly, exercise of the power to delay a

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was held invalid and unenforceable as applied to the facts of a particular case." As indicated above, no state statute was held invalid, either *in toto* or as applied, by the Court of Appeals.

[5] *State ex rel. Evans v. Click*, 102 Idaho 443, 631 P.2d 614 (1981), *cert. den.* 457 U.S. 1116 (1982); *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969 (1976); *State ex rel. Cox v. Hibbard*, 31 Or.App. 269, 570 P.2d 1190 (1977); *Gulf Oil Corp. v. Wyoming Oil and Gas Conservation Commission*, 693 P.2d 227 (Wyo. 1985).

federally approved project constitutes the power to prohibit and poses an actual conflict.

The Coastal Commission's ripeness argument is erroneous and disingenuous. The Coastal Commission expressly admitted in its Answer to the Complaint filed in the District Court that the issue decided by the Court of Appeals is "ripe" for review.[6]

This identical ripeness argument was also raised by the Coastal Commission before the Court of Appeals. In response, the Court held that this case presents an actual conflict in that an additional permit system would conflict with and undermine federal permit authority. G.R. App. A:7. The issue is thus "fit for judicial decision." *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Develop. Comm'n,* 461 U.S. 190, 201 (1982). Moreover, this issue is fit for review since "[t]he question of preemption is predominantly legal" and thus requires no further factual development. *Id.*

A second factor underlying a ripeness determination turns on "the hardship to the parties of withholding court consideration." *Id.* Postponement of this decision until Granite Rock applies for a state permit would pose a substantial hardship on the company, causing indefinite delay to its mining operation while it submits to the authority of the Coastal Commission. " 'One does not have to await the consummation of threatened injury to obtain relief. If the injury is certainly impending, that is enough.' " [Citations omitted.] *Id.*

Moreover, delayed resolution of this case would frustrate one of the key purposes of both the mining laws and Forest Service regulations by prohibiting mining and interfering with Congress' mandate that the federal government shall manage the multiple uses of its land.

Finally, independent state permit authority frustrates the policy of cooperative federalism underlying the Coastal Zone Management Act.

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[6] J.A. 20.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. The Supremacy Clause of the United States Constitution, Art. VI, cl.2 provides in pertinent part that:

> "the Laws of the United States . . . shall be the supreme Law of the Land."

2. The Property Clause of the United States Constitution, Art. IV, § 3, cl.2 provides in pertinent part:

> "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

3. The federal statutes involved include:

The Mining Act of 1872, 30 U.S.C. §§ 21 *et seq.* (relevant portions are reprinted in Appellee's Appendix A:10-13 ("A. App."); The Multiple Use Mining Act of 1955, 30 U.S.C. §§ 601 *et seq.* (relevant portions are reprinted in A. App. A:14-15); The Mining and Mineral Policy Act of 1970, 30 U.S.C. § 21a (reprinted in A. App. A:10); The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 *et seq.* (relevant portions are reprinted in A. App. A:16-21); and the National Forest Management Act of 1976, 16 U.S.C. §§ 1600-1614 (relevant portions are reprinted in A. App. A:9).

4. The Forest Service regulations involved, 36 C.F.R. §§ 228.1 *et seq.*, are reprinted in full in J.S.App., A:42-55.

STATEMENT OF THE CASE

A. Granite Rock's Mining Is Located On Federal Lands

No disputed issues of material fact exist. Granite Rock is a Watsonville, California company owned by the family of Bruce and Betsy Woolpert.[7] The company is engaged in the business of mining chemical and pharmaceutical grade white limestone in the Los Padres National Forest.[8]

The mining operation is conducted on unpatented mining claims on federally owned land. The present mining operation consists of a small quarry of approximately five to seven acres on

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[7] Declaration of Bruce Woolpert in Support of Plaintiff's Motion for Summary Judgment ("Woolpert Dec."), J.A. 100.

[8] Ninth Circuit Court of Appeals' opinion, G.R. App., A:2.

the inland side of Pico Blanco, approximately five miles from the coastline in a remote area and not visible from U.S. Coast Highway one.[9]

B. Forest Service Approved Plan of Operations After Environmental Assessment

In 1981, the United States Forest Service ("Forest Service") approved Granite Rock's five year (1981-1986) Plan of Operations, based on Granite Rock's over twenty years of testing and location work. Granite Rock then began to mine.[10] Federal approval of the Plan was based on a Forest Service Environmental Assessment Report compiled by a large team of federal and state environmental experts.[11]

The present Plan of Operations is for an exploratory mining operation.[12] The Plan controls the location and appearance of the mining operation, including the size and shape of any excavation, the location of all access roads and storage of any overburden.[13] The Plan specifies environmental mitigation techniques requiring stringent reclamation measures.[14] The Environmental Assessment states: "[a]s work proceeds, the disposal site will be landscaped to duplicate existing land forms. . . . The mining face will be left with a sculptured look to emulate natural rock outcrops."[15] The

[9] J.A. 38-41; Environmental Assessment, District Court Clerk's Record ("C.R.") 39, Appendix D, pp. 7-12 (visual analysis report).

[10] Granite Rock agrees with Coastal Commission to the extent that this controversy is not moot. See C.C.B., pp. 12-13 n. 17.

[11] The team consisted of 13 Forest Service specialists: the Forest Geologist; two Forest Landscape Architects; the Monterey District's Wilderness Manager, Fuel Management Foreman, Fire Management Officer, Planner, Resource Officer and Archaeologist; the Los Padres Forest Geologist and Landscape Architect; the Monterey Range Technician; the California Regional Water Quality Control Board; and the California Department of Fish and Game. Woolpert Dec., J.A. 101.

[12] J.A. 37, 39.

[13] J.A. 27-57.

[14] The reclamation measures involve, *inter alia*, the size and shape of the excavation, and the nature of the regrading and replanting to restore the mining site to a natural appearance. J.A. 42-43, 45, 49-50, 52-53; C.R. 39, Appendix D, pp. 19-22.

[15] J.A. 42.

visual analysis portion of the Plan notes that the mining area is only visible from several little-used trails.[16]

The Plan calls for "careful monitoring of mining activities of Pico Blanco" by the Forest Service.[17] It is undisputed that "[t]he exploration, annual assessment work, road construction, and operations have always been done under the supervision and approval of the U.S. Forest Service."[18]

Granite Rock chose to mine at the present quarry site for two principal reasons: (a) first, it is located in the heart of the pharmaceutical and chemical grade vein;[19] and (b) second, the mining operations are not visible from major public viewing areas.[20]

C. Mineral Deposit at Pico Blanco Is Unique

In 1982, after extensive study, the California State Mining and Geology Board classified the Pico Blanco deposit as a mineral of statewide significance. The mineral deposit at Pico Blanco is the largest deposit of its kind in the eleven western states.[21] This deposit is the only one in northern California from which limestone of such grade and purity is produced.[22] In addition to the pharmaceutical uses for Pico Blanco limestone, the chemical quality of the deposit makes it suitable for a number of environmental applications including control of acid rain; water filtration and acid reduction; stack gas removal on large combustion plants;

[16] C.R. 39, Appendix D, p. 7-8.

[17] C.R. 39, Appendix D, cover page.

[18] Woolpert Dec., J.A. 102.

[19] J.A. 39.

[20] C.R. 39, Appendix D (visual analysis report). There are no facts in the record of this proceeding to support any claim of nuisance or adverse environmental effects from the existing mining operation.

[21] Woolpert Dec., J.A. 102.

[22] Woolpert Dec., J.A. 100-101. The abstract of classification from the California State Mining and Geology Board stated:

> "Although there are limestone deposits in California that produce various grades of limestone, there is only one other deposit known in California from which high-grade white-grinding limestone is presently (1979) being produced. This deposit is located in Lucerne Valley, San Bernardino County, California."

acid control of lakes and reservoirs; and neutralization of chemical toxic waste.[23]

D. An Actual Conflict Arises

On October 17, 1983, after Granite Rock had operated without Coastal Commission objection for over two years, the Coastal Commission demanded that Granite Rock obtain a state permit or cease its mining operations.[24] Granite Rock immediately brought this action for declaratory and injunctive relief.

Granite Rock asserted three grounds why the state could not have the final permit authority over Granite Rock's unpatented mining claims on federal lands: (a) The federal laws applicable to mining claims on Forest Service lands preempt state permit authority; (b) Coastal Commission permit authority is precluded by the plain language of the Coastal Zone Management Act of 1972 ("CZMA"), 16 U.S.C. § 1453(1), excluding the subject lands from the coastal zone; and (c) The CZMA preempts state permit authority over the use of federal lands.

The Coastal Commission claimed that since the federal lands contained unpatented mining claims, these lands were somehow excluded from the public domain and hence were not excluded from the coastal zone under the CZMA, 16 U.S.C. § 1453(1). Second, the Coastal Commission claimed that CZMA affirmatively authorizes state permit authority, even if such authority might otherwise be impliedly preempted by other federal laws. Finally, the Commission contended that regardless of the CZMA, the right to assert the final permit authority over the use of federal lands was reserved under the state's police power.

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[23] Woolpert Dec., J.A. 102.

[24] J.A. 22-23. The letter from the Coastal Commission also stated that Forest Service approval of Granite Rock's Plan of Operations constituted the granting of a federal license or permit within the meaning of 16 U.S.C. § 1456(c)(3) of the CZMA and that mining operations conducted presently and in the future had to be consistent with the Coastal Zone Management Program. It is noteworthy that the Coastal Commission had actual notice of the approval of the Plan of Operations in 1981 but did not object. The Coastal Commission later admitted that it waived its right to review the Plan of Operations for consistency. C.C.B., p. 14-15 n.21, J.A. 17.

The District Court denied Granite Rock's Motion for Summary Judgment and dismissed the action. J.S.App. A:11-32.

The Court of Appeals reversed,[25] holding that independent state permit authority over a federally approved activity conducted on unpatented mining claims on federal lands is preempted by the federal mining laws and Forest Service regulations.[26] The Ninth Circuit recognized that the Forest Service is vested with the power to control initiation or continuation of mining on federal forest lands pursuant to the federal mining laws and administrative regulations. It accordingly held that independent state permit authority is equivalent to impermissable state veto power, and is thus preempted. G.R. App. A:8-10.[27]

E. The Record Makes Clear That the Coastal Commission Claims Veto Power Over Federally Approved Mining on Federal Lands

The narrow issue before this Court is whether the Coastal Commission has independent use permit authority over the subject federal lands. For three independent reasons, the answer to this question is "no."

1. The federal mining laws and Forest Service regulations preempt Coastal Commission permit authority;

2. Coastal permit authority is also prohibited by the plain language of the CZMA, 16 U.S.C. § 1453(1), which excludes federally owned lands from the coastal zone; and

3. Coastal Commission permit authority is preempted by the CZMA, which sets up a detailed cooperative scheme of federal and state regulation but specifically excludes independent state permit authority from the ambit of a state's jurisdiction.

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[25] See G.R. App. A:1-10 for the decision of Judge Wallace, joined by Judges Poole and Stephens.

[26] See parts III & IV for a detailed discussion of the mining laws and Forest Service regulations.

[27] The Ninth Circuit found it unnecessary to reach the CZMA issues. G.R. App. A:4.

For any one of these reasons, the Ninth Circuit's decision should be affirmed.[28]

The Coastal Commission has mistakenly attempted to broaden the questions presented to this Court to include whether all "state environmental regulation of private mining on national forest land" has been preempted. The answer to that broadly-phrased question is invariably "no."

Granite Rock has not, and does not presently, challenge all state or Coastal Act regulation over federal lands. The Ninth Circuit recognized,[29] and Granite Rock concurs, that there is room for state regulation. Under the Forest Service regulations, the state may set its own environmental standards which the Forest Service ordinarily will apply in exercising its permit authority. A state may urge the Forest Service to withhold or revoke a federal mining permit. Moreover, Coastal Commission regulation is provided for in the consistency provisions of the CZMA.[30] The consistency provisions provide a "model"[31] of cooperative federalism, while still insuring that the federal government has final decision-making power over the use of federal lands.

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[28] The CZMA provides an alternative ground for affirmance which this Court may reach, notwithstanding the Court of Appeals' failure to do so. Supreme Court resolution of an issue not reached by the Court of Appeals is appropriate when, as here, the District Court reached the issue, the parties fully brief the issue, and the issue involves the application of law to undisputed facts. *E.g., Capital Cities Cable, Inc. v. Crisp,* 104 S.Ct. 2694, 2699-2700 (1984); *New York City Transit Authority v. Beazer,* 440 U.S. 568, 583 n.24 (1979).

The CZMA issues were fully briefed by both sides at the District Court and Ninth Circuit levels. The District Court decided the issues. The District Court interpreted the § 1453(1) exclusion to apply only to federal lands unencumbered by any private interest and specifically not to those lands on which unpatented mining claims are located. The Ninth Circuit considered but found it unnecessary to decide the CZMA issues. G.R. App. A:4.

[29] G.R. App. A:9.

[30] 16 U.S.C. § 1456(c). The consistency provisions are not at issue herein.

[31] Babbitt, *Federalism and the Environment: An Inter-governmental Perspective of the Sagebrush Rebellion,* 12 Environ. Law 847, 859-860 (1982) ("Babbitt").

The sole possible reason for this dispute is that the Coastal Commission desires to prohibit mining on Pico Blanco.[32] While the Coastal Commission asserts that it merely wants to assure environmental protection, it already has that assurance. It could have reviewed Granite Rock's Plan of Operations for consistency

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[32] In its Brief in the Court of Appeals, the Coastal Commission complained that the Forest Service was not prohibiting mining.

> "While Granite Rock states that the EA required that there be no adverse environmental impacts (G.R. Br., p. 8), the Assessment shows on its face that the Forest Service assumed its decision 'must provide for the continuation of mining activities', *Id.* pp. 3, 13; that any no-action alternative that would disallow mining could not be considered, *Id.* p. 4; and that the best that the Forest Service could do was not eliminate all adverse impacts, as Granite Rock represents, but merely 'minimize [them] while providing for the continuation of mining activities' (*Id.* p. 3.)"

C.C.B., Ninth Cir., p. 6 n.2. In fact, the Forest Service has disallowed mining in some cases. *See e.g. United States v. Brunskill,* 792 F.2d 938 (9th Cir. 1986).

The Amicus Brief of the Big Sur Foundation, et al., p. 20, is more telling in its desire to prohibit mining on Pico Blanco. *See also* Amicus Brief of Council of State Governments, *et al.,* p. 12 n. 14.

Coastal Commission permits are governed by the Coastal land use plan. California Public Resources Code § 30604. Once the land use plan is certified by the Coastal Commission [as was done in the instant case in 1986], the County becomes the permitting agency. California Public Resources Code § 30519, 30600.

Here the Monterey County Big Sur Coast Land Use Plan ("LUP") does not encourage but in fact prohibits mining.

> "[I]t is the County's policy to prohibit all future public or private development visible from Highway 1 and major public viewing areas (the Critical Viewshed) . . . This applies to all structures, the construction of public and private roads, utilities, lighting, grading, and removal or extraction of natural materials. . . "

Policy 3.2.1, LUP, p. 11.

> "Because of the extraordinary scenic views of Pico Blanco from the Old Coast Road . . . views of Pico Blanco from the Old Coast Road are included in the Critical Viewshed as that term is used in Policies 3.2.1 . . . all other views from the Old Coast road shall be excluded from the Critical Viewshed."

Policy 3.8.4.4, LUP, p. 56. Under these regulations, support facilities such as roads and mining would be prohibited.

under 16 U.S.C. § 1456(c) in 1981, but admittedly waived its right to do so. The Commission may review any amendments or new plans of operation by Granite Rock for consistency with the California Coastal Program. Further, state agencies such as the State Water Quality Control Board and the Department of Fish and Game participated in the Environmental Assessment of the Plan of Operations. See n. 11, *supra*.

The federal government has regulatory authority over Granite Rock's mining and may seek an injunction if Granite Rock engages in environmentally harmful mining practices.[33] *United States v. Richardson*, 599 F.2d 290, 295 (9th Cir. 1979), *cert. den.* 444 U.S. 1014 (1980). Thus, up to the point of state prohibition of mining, there is environmental regulation of Granite Rock's operation under existing law. The Coastal Commission is urging this Court to adopt a new rule which would reverse precedent and drastically disrupt a long term federal-state balance deliberately fashioned by Congress.

The mere fact that the Coastal Commission seeks the right to affirm or deny a use previously sanctioned for over two years by the federal government, after the state had an opportunity to review the Plan of Operations for consistency under existing law, demonstrates that the Coastal Commission in reality seeks the right to override or prohibit a federal decision to allow mining on federal lands. Such state veto power is preempted, for final state veto power would make the state the final arbiter over the use of

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[33] The Coastal Commission has not alleged that Granite Rock is engaging in environmentally harmful mining practices. The only unsubstantiated statement to that effect is the statement from the Amicus Brief of the Big Sur Foundation, et al. p. 3. As stated in Granite Rock's accompanying Motion to Strike, there is no such evidence on record and Granite Rock requests that this material, as well as Exhibit A of this Amicus Brief be stricken, as it consists of burdensome, irrelevant, immaterial, and scandalous matter which is not in the record. United States Supreme Court Rule 34.6.

In contrast, the record shows that the Forest Service, as part of its Environmental Assessment of the Plan of Operations, included environmental mitigation measures based on input from state as well as federal officials. Woolpert Dec., J.A. 101. Granite Rock at all times complied with the Plan of Operations.

federal lands.[34] An illustrative comparison of Granite Rock's application for approval of Plans of Operations under existing state consistency review (Alternative A) and under the contested state permit authority (Alternative B) illustrates this point.

Alternative A Coastal Commission's Role With Consistency Review	Alternative B Coastal Commission's Role With Consistency Review and Permit Authority
1. Granite Rock submits Plan of Operations for federal approval.	1. Same
2. State is notified of application.	2. Same
3. State has 30 days to assert application is subject to consistency review.	3. Same
4. State may review application for consistency, but waives right to review.	4. Same
5. Following waiver or review, federal government, after receiving state input and working cooperatively with state, approves or denies application.	5. Same
6. Federal approval granted.	6. Same
7. Granite Rock begins to mine.	7. Granite Rock applies for state permit. State reserves power to either grant or deny permit.

In Alternative B, the whole purpose of Forest Service coordination of federal and state requirements and of CZMA consistency review, state input prior to federal approval or denial, is vitiated. Consistency review and federal approval both become meaningless, and there is no effective federal/state cooperation. The state impermissibly and unconstitutionally becomes the final arbiter of the use of federal lands.

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[34] The Coastal Commission now apparently concedes for the purpose of Supreme Court review that when conditions imposed by it pursuant to its permit authority would amount to a prohibition of an activity Congress has sanctioned, such as mining, such conditions are preempted. *See* C.C.B., p. 29.

SUMMARY OF ARGUMENT

1. Granite Rock had mined for over two years on federal lands pursuant to a federally approved Plan of Operations prior to the invalid assertion of a permit requirement by the California Coastal Commission. Pursuant to this Court's precedent, the Coastal Commission may not seek to veto that federal approval by an independent state permit process. That veto power would give the Coastal Commission the final say over the use and disposition of federal lands and is hence preempted.

2. Pursuant to the Property Clause, Art. IV § 3 cl. 2, Congress has exclusive and unlimited power to control the use and disposition of federal land. The fact that the federal lands at issue contain unpatented mining claims does not remove them from the public domain. Up until patent, the United States has paramount rights in the land, specifically, valuable reversionary and residual interests on the minerals and a present possessory right in the surface resources.

Contrary to the Coastal Commission's assertions, the states do not have inherent police power to control the use of federal lands. Their power as to unpatented mining claims has been limited by Congress to taxation of severed minerals and mining claims, state recordation and location requirements, and civil and criminal jurisdiction over individuals. Incorporation in the 1872 Mining Act of certain state law requirements relating to location and recordation of claims does not imply a Congressional delegation of land use authority to the states.

3. Congressional purpose under the mining and Forest Service laws mandates the preemption of state final permit authority. Since 1866, a fundamental purpose of the federal mining laws has been to insure that mineral lands of the United States remain open for exploration and development. After over one hundred years and many reevaluations by Congress, that purpose remains strong.

State veto power over the initiation or continuation of mining on unpatented mining claims on federal forest lands would conflict with this long standing Congressional purpose and is preempted.

A further Congressional purpose of the mining laws is to authorize federal agencies to manage forest lands for multiple

benefits while protecting surface resource values. Pursuant to this authority, the Forest Service manages its forest lands according to multifaceted criteria which provide for economic as well as recreational uses. To allow the Coastal Commission veto power of a federally approved use would make the state the final arbiter of uses of federal lands and would directly conflict with the Forest Service's management mandate. As such, it too is preempted.

4. Granite Rock's mining operations on federal forest lands are regulated extensively by the United States Forest Service. Under the Forest Service regulations, the Forest Service is required to manage the land so as to encourage mining while at the same time provide for reclamation and other environmental safeguards. The Forest Service is also the land use planning agency for the forest lands.

While the Forest Service coordinates with state and local agencies regarding environmental mitigation measures, it is the final arbiter. The Forest Service has the breadth of purpose, the expertise and authority necessary to accomplish the Congressional mandate. An independent state permit authority, particularly to an agency like the Coastal Commission, which has limited interests and no expertise in mining, would conflict with Congressional purpose.

5. Granite Rock alternatively submits that the plain language of the Coastal Zone Management Act (CZMA), 16 U.S.C. 1453(1), specifically excludes federally owned land from states' permit jurisdiction. Since Granite Rock's unpatented mining claims lie on federal lands, they are specifically excluded from the Coastal Commission's asserted permit authority. The CZMA also preempts the Commission's final permit authority. The CZMA establishes a policy of cooperative federal/state regulation of the coastal zone, which limits state regulation of coastal federal lands to "consistency review." Final permit authority over federal lands is reserved to the federal government.

ARGUMENT

I

COASTAL COMMISSION'S ATTEMPT TO PROHIBIT FEDERALLY APPROVED MINING ACTIVITIES CONDUCTED ON FEDERAL LANDS IS PREEMPTED

A. As the Ninth Circuit Correctly Held, the Holdings in *First Iowa* and *Ventura* Preempt Independent State Permit Authority Over the Use of Federal Lands

Once Congress has enacted laws regarding federal lands, all conflicting state laws are preempted. *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-154 (1982); *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976). State permit authority is preempted to the extent it actually conflicts with federal law, when compliance with both federal and state law is a physical impossibility or when state law obstructs the accomplishment of Congress' full purposes. *E.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 248; *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. and Develop. Comm'n.*, 461 U.S. at 204. *See also Louisiana Public Service Comm'n v. F.C.C.*, 106 S.Ct. 1890, 1898-1899 (1986). Federal regulations have no less preemptive effect than federal statutes. *Capital Cities Cable Inc. v. Crisp*, 104 S.Ct. at 2700.

In this case, state permit authority actually does conflict with federal laws. In addition, state law would obstruct Congressional purpose.

Contrary to the Coastal Commission's and Amici's assertions, the Ninth Circuit properly applied this well established general preemption law to the case at bar. The Ninth Circuit did not apply a *per se* rule, but correctly found that there was a conflict between the exercise of both federal and state final permit authority over Granite Rock's use of federal lands for mining.[35]

Pursuant to the Property Clause of the United States Constitution, Art. IV, § 3, cl. 2, Congress has exclusive power over the use and disposition of federal lands. A fundamental purpose of the federal mining laws is to insure that the mineral lands of the

[35] G.R. App. A:3.

United States remain open for exploration and development.[36] A further purpose of the mining laws, as well as the laws applicable to the Forest Service, is that the federal government *itself* manages its public lands in order to preserve them for multiple uses. (See part III for an examination of the purpose of the mining laws and the Forest Service laws and regulations.)

The Coastal Commission would obstruct the accomplishment of the purposes of both the federal laws and their implementing regulations by claiming authority to veto by permit the very activity promoted and approved by the federal laws. Under this Court's well established preemption doctrine, the Coastal Commission's permit authority is preempted.

This Court has consistently held that, when, pursuant to Congressional authority, a federal agency grants a permit, license or other approval of an activity, a state may not subsequently superimpose its own conflicting licensing or permit requirements on the activity. *See First Iowa Hydro Electric Coop. v. Federal Power Commission*, 328 U.S. 152, 164 (1946); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd.mem.* 445 U.S. 947 (1980). *See also Sperry v. State of Florida*, 373 U.S. 379, 385 (1963); *Federal Power Commission v. State of Oregon*, 349 U.S. 435 (1955).[37]

The Court of Appeals correctly applied the above principles to the case at bar, reasoning that the Coastal Commission's addi-

[36] The Ninth Circuit found this long standing federal policy (that lands remain open to mining) to be so strong that "even the Forest Service is limited in the amount of regulation it may impose as a condition of mining in national forests. . . . To allow a second tier of permit authority to be exercised by the states would undermine the Forest Service's ability to keep the applicable environmental requirements within the range of reasonableness." [Citations omitted.] G.R. App. A:9.

[37] The cases cited by the Coastal Commission at C.C.B., p. 39 n.40, are inapposite. In all the cases, the application of federal and state regulations did not create an irreconcilable conflict. Nor do any of the cases cited sanction final state permit authority over a federally permitted use *on federal lands*. In contrast, the facts in this case present an irreconcilable conflict since the state would have an impermissible "veto power" over uses on federal lands.

tional permit system "was preempted simply because it would undermine the federal permit authority." G.R. App. A-7.

In *First Iowa*, the state attempted to require a state permit as a condition precedent to securing a federal license for a project authorized under the Federal Power Act. This Court ruled that this "veto power . . . easily could destroy the effectiveness of the Federal Act" by subordinating to state control the planning decisions which Congress had committed to federal officials. 328 U.S. at 164. The Court found this "veto power" in conflict with the federal scheme and thus preempted. 328 U.S. at 181-183.

Here the Forest Service must make planning decisions for its lands and implement Congressional mandate that federal forest lands be managed to allow multiple uses, both economic and recreational, and that these federal forest lands be open for mineral exploration and development. See part IV *infra*.

The approval of a Plan of Operations pursuant to federal and state environmental standards in the instant case, is factually analogous to the Federal Power Act, the federal statute in *First Iowa*. Both involve a dual federal/state regulatory scheme, with provisions for state participation in the administrative processes prior to federal approval. 328 U.S. at 167-170.

The Ninth Circuit correctly applied the rationale articulated in *First Iowa*. When, as in *First Iowa* and this case, federal law "places the responsibility [of final decision] squarely upon federal officials . . . [a] dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable" and is preempted. 328 U.S. at 168; *accord Federal Power Commission v. State of Oregon*, 349 U.S. 435, 444-445 (1955) [state veto power "would result in the very duplication of regulatory control precluded by the *First Iowa* decision."] The rule in *First Iowa* was reaffirmed by this Court in *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Develop. Comm'n.*, 461 U.S. at 223 n.34.

The Ninth Circuit's decision applied the same reasoning as in *Ventura County v. Gulf Oil Co.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd. mem.* 445 U.S. 947 (1980), which presents a strikingly similar instance where the power to veto mining on federal forest lands was preempted. The rationale in *Ventura County* is fully

consistent with this Court's reasoning in *First Iowa*, and is directly on point herein.

Gulf Oil's mineral operations in *Ventura County*, like those of Granite Rock herein, were subject to extensive federal regulation.[38] As in the present case, the operations were located within the Los Padres National Forest and hence were subject to "Department of Agriculture conditions designed to combat the environmental hazards normally incident to mining operations." 601 F.2d at 1083-1084.

In *Ventura County*, the Ninth Circuit held that a requirement that Gulf Oil apply for a county permit for its federally approved activities was preempted. The court reasoned that even a tempo-

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[38] *Ventura County* cannot be distinguished, as asserted by the Coastal Commission (C.C.B., p. 43), because it involved the Mineral Lands Leasing Act, 30 U.S.C. § 181 *et seq.*) while this case involves the Mining Act. The Mineral Lands Leasing Act is no more pervasive than the Mining Act. *See, e.g.*, 30 U.S.C. §§ 187, 189. Mining operators under both schemes are subject to a pervasive scheme of environmental regulations.

For example, Granite Rock is subject to the following environmental regulations:

a. Forest Service regulations, 36 C.F.R. §§ 228.1 *et seq.* (1985);

b. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (See discussion of local interest representation under NEPA in *Ventura County v. Gulf Oil Corp.*, 601 F.2d at 1086.);

c. The Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (See particularly the requirements concerning federal compliance with state and local air quality standards at § 7418(a), and requirements for protection of visibility in Class I federal areas, [*e.g.*, the Ventana National Wilderness area adjacent to the subject mining claims] at § 7491.);

d. The Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (See § 1323(a) concerning federal compliance, similar to the Clean Air Act.);

e. The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* (See § 6903(27) which includes refuse from mines within the definition of "solid waste," and § 6962 concerning federal compliance, similar to the Clear Air Act.)

rary delay in a federally authorized operation while an operator applied for a state permit was an impermissible veto.

> Despite this extensive federal scheme reflecting concern for the local environment as well as development of the nation's resources, Ventura [County] demands a right of final approval. Ventura seeks to prohibit further activity by Gulf until it secures an Open Space Use Permit which may be issued on whatever conditions Ventura determines appropriate, or which may never be issued at all. The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.

601 F.2d at 1084.

B. State Authority to Prohibit is Unconstitutional Veto Power

The Coastal Commission (C.C.B., p. 43) and the Brief of Amici State of Alaska, et al., ("Western States Br., p. 36")[39] have attempted to distinguish *Ventura County* on the ground that the County there sought to prohibit or veto rather than merely to regulate federally authorized activity.

This argument misconstrues the nature of a "veto,"[40] which in common usage is synonymous with *authority to prohibit*.

In *Ventura County*, the Court of Appeals specifically rejected this argument. It reasoned that if Ventura County was allowed to assert permit authority over Gulf, the County would effectively have the "last word" on use of federal land and would have an *opportunity* to prohibit a federally approved activity.

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[39] Western States cites to state cases such as *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984); *State ex rel. Evans v. Click*, 102 Idaho 443, 631 P.2d 624 (1981) *cert. den.* 457 U.S. 1116 (1982); *State ex rel. Cox v. Hibbard*, 31 Or.App. 269, 570 P.2d 1190 (1977); and *Gulf Oil Corp. v. Wyoming Oil & Gas Conserv. Comm'n*, 693 P.2d 227 (Wyo. 1985) in support of this proposition.

[40] Veto is defined by Webster's Third New International Dictionary as a "... *power* possessed by one department or branch of government to forbid or *prohibit finally or provisionally* the carrying out of projects attempted by another department ...; b(1): the exercise of such authority."

> Ventura cannot bring an action seeking immediate recognition and implementation of its veto power over the Government's lessee and successfully contend that an adverse ruling would require "seeking out conflict" unnecessarily. The issue is whether Ventura has the power of ultimate control over the Government's lessee, and this issue persists whether or not a use permit would eventually be granted.

601 F.2d at 1084-1085.

Here, as in *Ventura County*, the Ninth Circuit recognized that the Coastal Commission's exercise of final permit authority over Granite Rock's mining activities, even if the state ultimately issues the permit with reasonable conditions and the delay is only temporary, is tantamount to a veto of a federally approved activity on federal lands—an impermissible veto. G.R. App. A:7.

Granite Rock conducted operations pursuant to the Plan of Operations for over two years prior to any objection by the Coastal Commission. As a condition of the federal approval of the Plan of Operations, Granite Rock has selectively located its quarry, has controlled the size and shape of its excavations, and has engaged in stringent mitigating measures designed to protect the environment, all in accordance with federal requirements. If Granite Rock was required to apply for a Coastal Commission permit, its federally approved mining operations would cease. The Coastal Commission would then have the power of ultimate control over the use of federal lands.

Following this Court's reasoning, *Ventura County* concluded that the permit application requirement was preempted since " '[the local ordinances stand] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, (1941) 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.ED. 581. [W]here those state laws conflict ... with other legislation passed pursuant to the property clause, the law is clear: The state laws must recede.' *Kleppe v. New Mexico, supra*, 426 U.S. at 543." *Ventura County v. Gulf Oil Corp.*, 601 F.2d at 1086. [Citation omitted.]

That reasoning applies to the instant case.[41]

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[41] Thus, the *First Iowa* and *Ventura County* rationale compels the rejection of the regulatory/prohibitory distinction articulated in state cases such as *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969

C. Rule Proposed by the Coastal Commission Would Trigger an Avalanche of Litigation in Federal Courts

The Coastal Commission concedes that when conditions imposed by it pursuant to its permit authority would amount to a prohibition of an activity that Congress has sanctioned, the conditions would be preempted. It advocates a test for preemption analysis of whether a state's permit requirements for uses of federal lands go too far. Such a vague standard would be an open invitation to litigation both by private parties and by the federal government, and would flood the federal courts with needless and wasteful litigation. Even Amicus Western States admits that this distinction would not work and would lead to an "odd result." Western States Brief, pp. 24-25.

Other than the *Ventura* case and *Granite Rock*, both cases brought by private parties supported by the federal government, there are currently no reported decisions in the Circuit Courts of Appeals dealing with this issue.

(1976); *State ex rel. Evans v. Click*. 102 Idaho 443, 631 P.2d 614 (1981); *Gulf Oil Corp. v. Wyo. Oil & Gas*, 693 P.2d 227 (Wyo. 1985). In classic self interest, these state courts ignore the fact that a state veto power over mining activities would prohibit the very activity sanctioned by Congress.

In contrast to *Click* and *Gulf Oil*, state cases such as *Brubaker v. Board of County Comm'rs*, 652 P.2d 1050 (Colo. 1982) and *Elliot v. Oregon Intern. Mining Co.*, 60 Or.App. 474, 654 P.2d 663 (1982) recognize that state prohibition of federally approved mining activities is preempted.

Merely because *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 P.2d (1981) deals with the Minerals Leasing Act does not mean it *sub silentio* overrules *Ventura County*. (See Western States Brief, p. 38.) The issue in *Commonwealth Edison* was whether the state could tax severance of minerals on federal lands. That limited state power has been historically upheld and does not imply any greater state power. See part II, *infra*.

II

STATE DOES NOT HAVE INHERENT POLICE POWER TO CONTROL THE USE AND DISPOSITION OF FEDERAL LANDS

A. Congress Has Exclusive and Unlimited Power Over the Use and Disposition of Federal Lands

The Property Clause of the United States Constitution gives Congress exclusive and unlimited power over the *use* and *disposition* of all federally owned lands. The presence or absence of state jurisdiction does not affect the exclusivity of the power of Congress. *Kleppe v. New Mexico*, 426 U.S. at 537, 539.[42]

It is well settled that only Congress has the power to "control [the] occupancy and use" of federal lands and state law cannot take that power from Congress. *Utah Power & Light Co. v. United States*, 243 U.S. at 403-405. Certainly the states do not have any power to permit or prohibit use of federally owned land:

> . . . [T]he settled course of legislation, congressional and state, and repeated decisions of this court, have gone upon the theory that the power of Congress is *exclusive* and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a state has civil and criminal jurisdiction over lands within its limits belonging to the United States, *but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may require rights in them.* [Citations omitted; emphasis added.]

243 U.S. at 404.

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[42] See also, *Utah Power and Light Co. v. United States*, 243 U.S. 389, 404 (1917); *Camfield v. United States*, 167 U.S. 518 (1897); *Ventura County v. Gulf Oil Corp., supra*; *United States v. Brown*, 431 F.Supp. 56, 62-63 (D. Minn. 1976) *aff'd.* 552 F.2d 817 (8th Cir.) *cert. den.* 431 U.S. 949 (1977). Congressional power over its land is so broad that it can extend to control the use of even state and privately owned land when such use interferes with a federally sanctioned use of federal land. *Camfield v. United States*, 167 U.S. at 524-525; *United States v. Brown*, 431 F.Supp. at 62-63.

Pursuant to the Property Clause, Congress has enacted statutes and regulations which establish its control and discretion over uses of federal mineral land. In the case of Granite Rock's unpatented mining claims located on federal forest lands, Congress has delegated authority to the Secretary of Agriculture and Department of Forestry to manage the surface resources. 16 U.S.C. §§ 478, 551; 36 C.F.R. § 228.1 (1985).[43] In addition, the mineral resources are managed by the Bureau of Land Management under the federal mining laws and the Federal Lands Policy and Management Act and implementing regulations [see part III C. *infra*].

Any contention that the state has inherent police power to regulate mining by virtue of the alleged possessory interests of the mining claimant and the fact that the claims may be patentable is erroneous. A basic tenet of the Mining Law of 1872 is that title to unpatented mining claims remains with the United States. The only event that triggers a change in title is a patent. 30 U.S.C. § 26 (1982); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963).[44] The United States as the "paramount" owner has a present possessory right in mining lands as well as a "valuable residuary and reversionary interest" as trustee for the benefit of the people. *United States v. Rizzinelli*, 182 F. 675, 681 (D. Idaho 1910). See also *United States v. Weiss*, 642 F.2d at 299. " . . . [U]ntil the claim is advanced to patent, the United States retains *superior* rights in the property." *Freese v. United States*, 6 Cl.Ct. 1, 10 (1984), *aff'd without published opinion*, 770 F.2d 177 (Fed. Cir. 1985) [emphasis added].[45] The only relevant distinction in

[43] See *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336-38 (1963),*Cameron v. United States*, 252 U.S. 450, 459-60 (1920); *United States v. Weiss*, 642 F.2d 296 (9th Cir. 1980) [Court of Appeals affirmed injunction of mining claimant's activities disturbing surface resources of National Forest and upheld the delegation of Congressional authority to the Secretary of Agriculture "to regulate mining operations on national forest land."]

[44] See also *Cameron v. United States*, 252 U.S. at 460; *Farrell v. Lockhart*, 210 U.S. 142 (1908); *Brown v. Curney*, 201 U.S. 184 (1906); *St. Louis Mining and Mining Co. v. Montana Milling Co.*, 171 U.S. 650 (1898). *Freese v. United States*, 639 F.2d 754 (Ct. Cl. 1981).

[45] See also *Best v. Humboldt Placer Mining Co.*, 371 U.S. at 336; *Skaw v. United States*, 2 Cl.Ct. 795, 800 (1983), *rev'd on other grounds*, 740 F.2d 932 (Fed. Cir. 1984). Significantly, *Skaw* recognizes that a state may not prohibit mining. 740 F.2d at 940.

the mining laws is between an unpatented and a patented mining claim.

In the recent mining case *United States v. Locke*, 105 S.Ct. 1785 (1985), this Court noted the paramount rights of the United States in mining claims.

> [A]lthough owners of unpatented mining claims hold fully recognized possessory interests in their claims, see *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335, 83 S.Ct. 379, 381, 9 L.Ed.2d 350 (1963), we have recognized that these interests are a "unique form of property." *Id.*, 371 U.S. at 335, 83 S.Ct. at 382. The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired. *See, e.g., Kleppe v. New Mexico*, 425 U.S. 529, 539, 96 S.Ct. 2285, 2291, 49 L.Ed.2d 34 (1976).
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> * * *
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> Claimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests. *Cf. Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413, 103 S.Ct. 697, 706, 74 L.Ed.2d 569 (1983).

105 S.Ct. at 1798 (1985).

Thus, a mineral interest is subject to the power of the federal government at all times prior to patent.

B. Limited Jurisdiction of States, Including the Power to Tax, Does Not Imply Concurrent State Jurisdiction Over the Use and Disposition of Federal Lands

The Coastal Commission and Amicus Western States base their contention that the state has inherent police power to regulate the use of federal land upon cases which permit (a) state taxation; (b) state civil and criminal jurisdiction over individuals on federal lands; and (c) upon cases involving state recordation and location requirements.[46] These cases, however, support Gran-

[46] None of the cases cited at C.C.B., p. 23 approve state land use permit authority and none are "outcome determinative" of the use of federal lands. *See United States v. County of Fresno*, 429 U.S. 452

ite Rock's position that state police power does not extend to veto power over federally approved *uses* on federal lands. As this Court stated in *McKelvey v. United States*, 260 U.S. 353, 359 (1922),

> It is firmly settled that Congress may prescribe rules respecting the use of the public lands. It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned. [Citations omitted].

In *Utah Power & Light Co. v. United States*, this Court expressly rejected the Coastal Commission's and Western States' argument that limited state jurisdiction over individuals, including the right to tax, implied some further state concurrent jurisdiction over land "occupancy or use." 243 U.S. at 404 (see p. 23 *supra*). *Utah Power & Light* makes it clear that Congress, alone, controls "occupancy and use" of federal lands. Amicus Western States' reliance on a water rights case is similarly misplaced.[47]

In the more than one hundred years since the first federal mining law was passed, there have been no federal decisions which authorize state veto power over the use of federal lands. The absence of such decisions is striking.[48]

Furthermore, the legislative history of the CZMA establishes that consistency review was meant to give additional authority to the states, specifically, the right to design Coastal Management Programs and to comment on and review proposals for use of

(1977) [taxation]; *Wilson v. Cook*, 327 U.S. 474 (1945) [taxation]; *McKelvey v. United States*, 260 U.S. 353 (1922) [personal jurisdiction]; *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905) [location requirements]; *Lockhart v. Johnson*, 181 U.S. 516, 526-527 (1901) [location and work requirements]; *Kendall v. San Juan Silver Mining Co.*, 144 U.S. 658, 664-665 (1892) [claim recording requirements]; *Erhardt v. Boaro*, 113 U.S. 527 (1885) [work requirements]; *Forbes v. Gracey*, 94 U.S. 762 (1876) [taxation]; *United States v. California*, 655 F.2d 914 (9th Cir. 1980) [conflict of law]; and *Northmore v. Simmons*, 97 F. 386 (9th Cir. 1899) [work requirements].

[47] Amicus Western States' Brief cites repeatedly to *California v. United States*, 438 U.S. 645 (1978). See pp. 9, 35, 61 of Brief. *California v. United States* is factually distinguishable, and did not involve public lands, but involved state water supply over which the state had never ceded authority and its right of disposal was supreme. 438 U.S. at 654, 662.

[48] *See* n. 41, *supra*.

federal lands (see part V, *infra*). The states have no such right absent the consistency review powers ceded to them under the CZMA. It would make no sense that Congress carefully excluded federal lands from the coastal zone in the CZMA, a scheme of regulation with substantial federal supervision, and gave the states a window of participation via consistency review, if the states could later on independently exercise inherent permit power over federal lands.

Another essential difference between federal and state power over federal lands is that, while the federal government may prohibit mining or other uses of federal land, the state may not.[49] The difference is critical. It underscores the Congressional determination that the federal government is to be the final arbiter of the use of federal mining land. While the federal government may enjoin mining on federal land [*United States v. Richardson, supra*] or condemn the interest of a mining claimant on federal land (*North American Transportation & Trading Company v. United States*, 53 Ct.Cl. 424 (1919), *aff'd* 253 U.S. 330 (1920)), a state may not enjoin such mining (*Ventura County v. Gulf Oil Co., supra*) or condemn the unpatented mining claim. (*cf. Transwestern Pipeline v. Kerr-McGee Corp.*, 492 F.2d 878 (10th Cir. 1974), *cert. dismissed* 419 U.S. 1097 (1975).

C. Incorporation of State Locational and Recordation Requirements in the Federal Mining Laws Does Not Extend State Power to Final Permit Authority Over the Use of Federal Lands

The Coastal Commission and the Amicus Western States contend that because the original 1872 Mining Law incorporated the laws of the various mining districts as to recordation and location of claims, Congress intended in the mining laws to allow

[49] Amicus Western States' reliance on a nuisance case, *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F.753 (9th Cir. 1884) for the proposition that a state may prohibit uses on federal land is misplaced. Western States Br. 18-19. There, one down-stream private-property owner sued a mining company, based on state nuisance law, for its practice of sending tons of hydraulic mining debris down onto the plaintiff's lands. The state was not seeking to prohibit mining. In the instant case, there is no allegation that Granite Rock's mining pursuant to the federally-approved Plan of Operations, is a nuisance..

total state regulation of the use of federal lands for mining.[50] An examination of the evolution of the mining laws demonstrates that this is incorrect.

The purpose of the 1872 Mining Law, 30 U.S.C. § 21 *et seq.*, was

> . . . to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws and decisions of the courts, and to prevent such rights from being lost on a sale of the lands.

Jennison v. Kirk, 98 U.S. 453, 457 (1878). The initial recognition of local mining district customs was born of necessity as the federal government initially lacked sufficient knowledge of or presence in the western mining regions to interpret or enforce claims or recordation laws or to adjudicate claims of conflicting miners.

A foremost mining law commentator, Curtis H. Lindley, noted that the history of the mining laws was of an enlarging federal scheme of statutory regulation which gradually displaced local or district regulation. Lindley and another noted mining commentator, Dean Costigan, surveyed the types of state or local regulations that were within the states' powers and those that conflicted with federal law.[51] At the outset of federal regulation, there were

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[50] A recent Congressional enactment requires Granite Rock to report its assessment work to the federal government. *See* 43 U.S.C. § 1744.

[51] By 1914, types of regulations that were within the states' powers to legislate were: length and width of lode claim, posting, recording and contents of certificates, notices of location, authorization of amended location certificates, marking of boundaries, requiring the sinking of discovery shaft prior to completion of location, fixing time within which location shall be completed after discovery, providing for the manner of relocating abandoned claims, amount of and posting notice of annual work, authorizing recording of affidavits of performance of annual labor, prescribing manner of organizing mining districts. 1 Lindley, *Mines*, § 250 at 546-562 (1914) ("Lindley"). *See also* Costigan, *Mining Law*, §§ 4 & 5 at 21-29 (1908).

Attempted legislation which was in conflict with federal law included: laws giving locator right to lodes which have their tops or apex within the location and defining the extralateral right, prohibiting the proprietor of a mining claim from pursuing his vein on its strike beyond vertical

already mining claims implicitly approved by the federal government and governed, as to claim location and other requirements, by local mining districts. As Lindley commented:

> The unqualified legislative recognition of these local systems was a simple act of justice. Any other course would have involved a practical confiscation of property acquired and developed by the tacit consent of the government.

1 Lindley, § 56 at 92-93. The systems recognized, however, did not include state or local regulation of the use of federal lands.

After the passage of the 1872 Mining Act, federal laws began to supplant local regulations. Only those laws not in conflict with federal laws survived. 1 Lindley, § 76 at 116. Even in the early years of federal regulation, a local or state mining rule was preempted if it impaired the right granted by Congress to use the land for mining. *Calhoun Gold Mining Co. v. Ajax Gold Mining Co.*, 182 U.S. 499, 509 (1900); *Enterprise Min. Co. v. Rico Aspen Consol. Min. Co.*, 167 U.S. 108, 114-115 (1897); *Belk v. Meagher*, 104 U.S. 279, 285 (1881); *Original Co. of the W. & K. v. W.M. Co.*, 60 Cal. 631 (1882).

> When it is recognized that the government simply occupies the *status* of a landed proprietor, holding the paramount title to its public domain, with the sole right of disposal upon such terms and conditions and subject to such limitations as it may from time to time prescribe [footnote omitted], and that the congressional mining laws are but a statement of such terms, conditions, and limitations, it follows necessarily that neither individuals nor states have the power to control,

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planes drawn through surface boundaries, verification of location certificates by oath. 1 Lindley, § 251 at 562-563; Costigan, *Mining Law*, §§4 & 5 at 21-29.

Some of these district rules involved punishment for mule stealing and murder—both "death by hanging." 1 Lindley, § 42 at 74. As Lindley notes, however:

> "The main object of the regulations was to fix the boundaries of the district, the size of the claims, the manner in which the claims should be marked and recorded, the amount of work which should be done to hold the claim, and the circumstances under which the claim was considered abandoned and open to occupation by new claimants."

Id.

> modify, or nullify any of such terms, conditions, or limitations.

1 Lindley, § 249 at 542-543. See also *Gibson v. Chouteau,* 80 U.S. (13 Wall.) 92, 99 (1871); *Irvine v. Marshall,* 61 U.S. (20 How.) 558, 561 (1857).

The early state and local regulations tacitly approved by the federal mining laws are in no way parallel to the type of veto power over the use of the federal lands sought by the Coastal Commission. Moreover, the mining laws themselves expressly recognize that state law is preempted insofar as it is in conflict with the laws of the United States. *See, e.g.,* 30 U.S.C. §§ 22, 26.

The Coastal Commission (C.C.B., pp. 23-24) and Western States (Brief, pp. 18-19) claim that early nuisance cases[52] were in fact examples of state environmental regulation. These cases concerned what is not here at issue, namely the right of a downstream property owner or the public to sue a mining company for what is in effect a public nuisance. 3 Lindley, § 848-849 at 2093-2099.

III

THE PURPOSES OF CONGRESS EXPRESSED IN THE MINING STATUTES MANDATE PREEMPTION

A. Dual Purpose

A fundamental purpose of the federal mining laws is to insure that mineral lands of the United States remain open for exploration and development. *United States v. Weiss,* 642 F.2d at 299.

> The general purpose of the mineral laws is well understood; it was to encourage citizens to assume the hazards of searching for and extracting valuable minerals deposited in our public lands.

United States v. Rizzinelli, 182 F. at 682. *See also United States v. Coleman,* 390 U.S. 599, 602 (1968).

The policy was first codified in the Mining Act of 1872, 30 U.S.C. § 22: " . . . all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and

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[52] *Gold Washing & Water Co. v. Keyes,* 96 U.S. (6 Otto.) 199 (1877); *Woodruff v. North Bloomfield Gravel Mining Co.,* 18 F. 753, 772-775 (9th Cir. 1884); *People v. Gold Run Ditch & Mining Co.,* 66 Cal. 138, 151-152 (1884).

purchase." It has been reaffirmed in more recent enactments. In the Mining and Mineral Policy Act of 1970, 30 U.S.C. § 21a, Congress declared " . . . [i]t is the continuing policy of the Federal Government and in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries . . ."[53] *See also* the National Materials and Mineral Policy Research and Development Act of 1980, 30 U.S.C. §§ 1601, 1602 and 1605.[54]

The mining law also requires that the federal government manage its lands by balancing competing interests, including the right to mine, environmental protection, and the rights of surface users (the general public).

B. Mining Law Has Evolved Since 1872

The Coastal Commission and Amicus Western States discuss the federal mining law as if it were totally static since its inception in 1866 and 1872 and ignore the myriad modifications that have occurred since then. The history of the mining laws[55] is one of constant reaffirmance of the right of the claimant to mine balanced with the federal policy to retain and manage its land. The evolution of the federal mining laws parallels in both timing and

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[53] The legislative history of the Mining and Minerals Policy Act of 1970 describes the need for and establishment of a "broad overall national minerals policy with particular emphasis on the need for an economically sound and stable domestic mining and minerals industry." H.R. Rep. No. 1442, 91st Cong.2d Sess., 1970 U.S. Code Cong. & Ad. News p. 5792-5793.

[54] The reason that the United States encouraged the private sector to develop mineral interests is that such development has historically been a very expensive and risky proposition. S. Rep. No. 554, 84th Cong., 1st Sess. 2 (June 22, 1955); 101 Cong. Rec. 9322 (June 28, 1955) [remarks of Senator Malone]; *Management of Fuel and Non-Fuel Minerals In Federal Land,* Cong. Office of Technology Assessment 39, 61 (1979) (OTA Report).

[55] The Mining Act of 1872, 30 U.S.C. § 21 *et seq.*; The Multiple Use Mining Act of 1955, 30 U.S.C. § 601 *et seq.*; The Mining and Mineral Policy Act of 1970, 30 U.S.C. § 21a; The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.*; and The National Materials and Mineral Policy Research and Development Act of 1980, 30 U.S.C. § 1601 *et seq.*

subject matter the evolution of environmental regulation and environmentalism. The Coastal Commission erroneously states that the Mining Act of 1872 evinces congressional intent to leave environmental regulation up to the states. In fact, in 1872, the states were not regulating the environment any more than the federal government.

When the 1872 Act was passed, the policy of Congress was to dispose of federal forest lands to persons who spent the requisite money and effort to locate valuable minerals on these lands and patent their claims. At that time a mining claimant possessed both the minerals and the surface resources. 17 Stat. 91, 30 U.S.C. § 26. Even then however, courts recognized "[T]he paramount ownership being in the government and it also having a reversionary interest in the possessory right of the locator, it clearly has a valuable estate which it is entitled to protect against waste and unlawful use." *United States v. Rizzinelli*, 182 F. at 684.

In 1955 however, Congress passed the Multiple Use Mining Act.[56] The Act provided that for subsequently located unpatented claims, the federal government would retain and manage the surface resources.

> The bill would accomplish this by vesting in the responsible United States administrative agency authority to manage and dispose of vegetative surface resources on such locations, to manage other surface resources thereof (except minerals subject to the mining laws), and to use so much of the surface as is necessary for management purposes or for access to adjacent lands.

H.R. Rep. No. 730, 84th Cong. 1st Sess., 1955 U.S. Code Cong. & Ad. News 2474, 2475. *See also id.* at 2480. The Act also reconfirmed that mining remained a dominant use. *See* 30 U.S.C. § 612.

In *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277 (9th Cir. 1980) the Court of Appeals for the Ninth Circuit noted:

> One of the clear purposes of the 1955 legislation was to prevent the withdrawal of surface resources from other public use merely by locating a mining claim. . . . Essentially

[56] 30 U.S.C. § 601, *et seq.*

> the surface resources remain in the public domain for uses as before with the exception that the mining claimant is entitled to use the surface resources for prospecting and mining purposes and that the other uses by the general public cannot materially interfere with the prospecting and mining operation. Thus, the vast acreage upon which mining claims have been located since 1955 are claims which, by operation of the statute, have become subject to the provisions of § 612(b), remain open for public use except for the restrictions imposed where actual mining or prospecting operations are taking place. [Footnote omitted.]

611 F.2d at 1285.[57]

The federal government retains control over the surface of mineral lands pursuant to the Multiple Use Mining Act of 1955 and similar legislation.[58]

C. Congress Has Decreed Federal Agencies Are to Plan and Manage Federal Lands; Federal Agencies Are the Final Decisionmakers

The policy of the United States to manage its public lands was further strengthened in 1976 with the passage of two pieces of legislation which mandated the preparation of federal land use plans: (a) the Federal Lands Policy and Management Act, 43 U.S.C. § 1701 *et seq.* ("FLPMA"), which applies to public lands and mineral claims administered by the Bureau of Land Management ("BLM");[59] and (b) the National Forest Management Act, 16 U.S.C. §§ 1600-1614, which applies to forest lands.

[57] *See also Skaw v. United States*, 740 F.2d 932 (Fed.Cir. 1984); *United States v. Richardson*, 599 F.2d at 295; *United States v. Cruthers*, 523 F.2d 1306 (9th Cir. 1975).

[58] The federal government has also exercised its authority over mining claims in the Multiple Mineral Development Act of 1954, 30 U.S.C. § 521, *et seq.*; the Mining Claims Occupancy Act, 30 U.S.C. § 701, *et seq.*; and the Mine Safety and Health Act, 30 U.S.C. § 801, *et seq.*

[59] The BLM is responsible for managing the mineral resources but not the surface impacts of mining on federal forest lands. The BLM regulations cited by the Coastal Commission (C.C.B., p. 25) explicitly do not apply to the "National Forest System". 43 C.F.R. § 3809.0-5(c) (1985).

FLPMA mandated the Secretary of the Interior to develop land use plans for the federal lands under his or her control and to manage the lands according to those plans. 43 U.S.C. §§ 1712(a) and 1732(a). These plans are only required to be consistent with state and local land use plans to the "maximum extent" the Secretary "finds consistent with Federal law" and the purposes of FLPMA. 43 U.S.C. § 1712(c)(9).

The legislative history of FLPMA demonstrates that Congress intended to preempt conflicting state and local land use plans on federal lands.[60] The legislative history also makes it clear that conformity with local or state land use plans is not required for federal lands. Sections 209 and 210 (codified at 43 U.S.C. §§ 1719, 1720) of FLPMA, which allow the Secretary to insert terms or conditions in patents so as to insure compliance with state land use plans, only apply to lands patented or conveyed out of federal ownership and not to lands retained by the federal

[60] The early House version of the bill required that federal land use plans be consistent with state and local land use plans "to the maximum extent feasible." The language was objected to by both the Department of the Interior and the Department of Agriculture. H.R. Conf. Rep. No. 1163, 94th Cong. 2d Sess. 38, 45, 1976 U.S. Code Cong. & Ad. News 6175, 6219.

After those comments were received, the language was amended to give the Secretary of the Interior the power to plan in a manner consistent with federal laws and, if necessary, inconsistent with state and local land use plans. 43 U.S.C. § 1712(c)(9). House Conference Report No. 1724 states:

> "The conferees adopted a consolidation of the Senate and House provisions for coordination of BLM land use planning with Federal, State, local governments, and Indian tribes, with revisions making clear that the ultimate decision as to determining the extent of feasible consistency between BLM plans and such other plans rests with the Secretary of the Interior. This affirmed the need to maintain the integrity of governing Federal laws and Congressional policies."

H.R. Conf. Rep. No. 1724, 94th Cong. 2d Sess. 58, 1976 U.S. Code Cong. & Ad. News 6228, 6229.

See also Hubbard, *Dredge Mining and Wild Burros—A Tale of Two Cases And The Issue of State Versus Federal Regulation of Mineral Development on Public Domain Lands*, 23 Rocky Mtn. Min. L. Inst. 71 (1977).

government. *Legislative History of the Federal Land Policy and Management Act of 1976*, Publication No. 95-99, 95th Cong. 2d Sess., Committee on Energy and Natural Resources, pp. 114-115 (1978).

The National Forest Management Act, 16 U.S.C. §§ 1600-1614, does not require that forest plans comply with local land use plans. It merely mandates the establishment of proceedings wherein state and local governments are given an "opportunity to comment upon the formulation of standards, criteria and guidelines applicable to Forest Service programs." 16 U.S.C. § 1612(a). Under the Forest Service Planning Regulations, [36 C.F.R. §§ 219 *et seq.* (1985)], the Forest Service is to coordinate with land planning efforts of state and local governments. 36 C.F.R. § 219.1. In this coordination effort, the Forest Service is to solicit comment from and meet with representatives of state and local government, but remains the final decisionmaker. 36 C.F.R. §§ 219.3, 219.4(6)(3), 219.7.[61]

IV

FOREST SERVICE ADMINISTERS MINING AND MULTIPLE USE POLICIES OF CONGRESS

A. Forest Service's Surface Impact Regulations

Granite Rock's mining claims are located on federal forest lands which are administered by the Forest Service under regulations adopted under the authority of the Organic Administration Act of 1897, 16 U.S.C. §§ 478, 551. Pursuant to its authority under the Property Clause, the United States has "broad discretion to regulate the manner in which mining activities are conducted on the national forest lands." *Freese v. United States*, 6 Cl.Ct. at 14. Congress has authorized the Forest Service to regulate the surface uses of the lands as well as surface impact from mining. *See e.g.*, 36 C.F.R. §§ 228.1 *et seq.* (1985).

As the Forest Service is a multiple purpose resource and environmental management entity, it has the breadth of purpose and authority necessary to balance mining interests with environ-

[61] "The Forest Supervisor has overall responsibility for the preparation and implementation of the forest plan and preparation of the environmental impact statement for the forest plan." 36 C.F.R. § 219.10(a)(2). *See also Forest Service Manual*, § 2806 (1983).

mental concerns.[62] The Forest Service is required to obtain an overall perspective in light of critical mining, environmental, and economic considerations.[63] In contrast, the Coastal Commission has limited interests and no expertise in mining. Allowing the Coastal Commission a veto power over mining on federal lands would impair and conflict with the Forest Service's congressionally mandated balancing of these considerations.

Early on, the Forest Service adopted regulations that restricted the miner's right of use and occupancy of the claim to those activities necessary for development of the claim. *Teller v. United States,* 113 F. 273 (8th Cir. 1901); *United States v. Rizzinelli,* 182 F. 675 (D. Idaho 1910). After the passage of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.,* in 1969, the Forest Service promulgated proposed regulations which it distributed to the public in 1971. In 1974, these regulations were adopted. The Ninth Circuit upheld the regulations in 1981. *United States v. Weiss,* 642 F.2d at 297, 299.

Even prior to the adoption of the Forest Service regulations, the Forest Service could, based on department directives and guidelines and the Multiple Use Mining Act of 1955, "require the locator of an unpatented mining claim on national forest lands to use nondestructive methods of prospecting." *United States v.*

[62] As the *Forest Service Minerals Program Handbook* (1983) provides:

> "[T]he demand for mineral development must be balanced against the demand for renewable resources and the land management agency's responsibility to reasonably protect the environment." . . .
>
> "The Forest Service responsibility in this regard is to provide for the exploration and development of mineral resources as provided by law, and to manage National Forest lands for multiple benefits while protecting surface resource values."

Id., p. 6, 7.

[63] A list of factors considered by the Pacific Northwest Region of the Forest Service include: (1) Mineral supply/demand factors; (2) Critical nature as related to foreign dependence; (3) Probable future situation; (4) Present or future sources of energy; (5) Present land allocation related to mineral exploration and development; (6) Plans of state and local governments; and (7) Industry input. *Land Management Planning Direction Pacific Northwest Region,* p. 3-30, January 15, 1984 (Rev.)

Richardson, 599 F.2d at 291. There is a long history of federal environmental regulation of mining claims on federal forest lands. *See Freese v. United States,* 6 Cl.Ct. at 11-12.[64]

The regulations require that mining operations on federal forest lands " . . . shall be conducted so as to minimize adverse environmental impacts on Natural Forest System surface resources." 36 C.F.R. § 228.1. Mining operators are required to submit a notice of intention to operate and, if the operations will "likely cause significant disturbance of surface resources, the operator shall submit a proposed plan of operations to the District Ranger." 36 C.F.R. § 228.4(a).

The plan of operations is required to describe the type, duration, and location of proposed operations, the access routes and "measures to be taken to meet the requirements for environmental protection in § 228.8." 36 C.F.R. § 228.4(c)(3).[65]

These requirements include compliance with applicable state and federal air and water quality standards and standards for the disposal of solid wastes, conformance of operations with scenic values, maintenance and protection of fisheries and wildlife habitats, environmentally sound construction of roads and reclamation of the surface, including control of erosion, water runoff, and reshaping and revegetation of disturbed areas where reasonably practicable. 36 C.F.R. § 228.8.

The Ninth Circuit correctly held that the "power to prohibit the initiation or continuation of mining in national forests for failure to abide by applicable environmental requirements lies with the Forest Service. 36 C.F.R. § 228.4-5 (1984)"; G.R. App. A:9. *See e.g.,* 36 C.F.R. § 228.4(a): ("If the *District Ranger determines* . . ."; ". . . submit a proposed plan of operations to *District Ranger.*"); *Id.* 228.5(a): (". . . *District Ranger* shall . . .

[64] Contrary to the Coastal Commission's assertions at C.C.B., p. 10 n.13, Forest Service regulation antedated 1971. It certainly preceded the 1976 California Coastal Act. California Public Resources Code §§ 30000 *et seq.*

[65] 36 C.F.R. § 228.8(h) authorizes the Forest Service, in its discretion, to accept state certification of compliance with narrowly defined environmental regulations. However, state certification is not synonymous with the final land use permit authority at issue here. *See e.g.* 33 U.S.C. § 1341(a)(1); California Water Code § 13160.

analyze the proposal, considering the economics of the operation along with the other factors in determining the reasonableness of the requirements for surface resource protection.")[66]

The Coastal Commission (C.C.B., p. 31-32) asserts that state environmental regulation is needed to supplement underfunded and insufficient federal environmental regulation citing studies which deal with the inadequacies of the BLM. These same studies, however, conclude that the Forest Service, which has different regulatory tools, has solved many of these same alleged problems and is effective in reclamation efforts.[67]

In addition to the regulation of surface disturbances from mining on forest lands, the Forest Service also regulates the use of those lands pursuant to the National Forest Management Act, ("NFMA"), Pub. L. No. 94-588, 90 Stat. 2949, 16 U.S.C. §§ 1600-1614.[68] Pursuant to this act, the Forest Service policy is

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[66] As the Ninth Circuit held, the statement by the District Ranger in the Environmental Assessment of Granite Rock's Plan of Operations that Granite Rock is responsible for obtaining any necessary permits which may be required by the California Coastal Commission is a "routine staff statement [which] cannot change the effect of the formally adopted regulations." G.R. App. A:10. A state permit requirement that is preempted is not required. *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. at 153, 157-159, 162.

[67] For example, the 1986 GAO Report to the Secretary of the Interior, *Interior Should Ensure Against Abuses From Hardrock Mining* 28-30 (1986), notes that, due to the lack of a bonding requirement, the BLM has difficulty getting mining operators to reclaim mining sites. The GAO stated that the Forest Service, through its widely used bonding requirements, has sufficient funds for carrying out reclamation.

The Office of Technology Assessment noted the expertise and authority of the Forest Service to enforce surface use restrictions on mineral activities. OTA Report, pp. 23, 108, 182, 194, 283.

Similarly Gates, *History of Public Land Law Development*, 762 (1979) commends the Forest Service:

> "Compared with the history of mineral conservation, the national forests have long been the subject of careful conservation techniques by the Forest Service of the Department of Agriculture."

[68] Although the Act does not specifically require the Forest Service to plan for mineral development, the regulations implementing it require such planning. 36 C.F.R. § 219.22 (1985).

to "[i]ntegrate exploration, development and production of energy and other mineral resources . . . with the use and conservation of other resources to the fullest extent possible." *Forest Service Manual* § 2802 (1984).

As commentators have noted: "During the last fifteen years, then, the Forest Service has become increasingly vigorous in protecting its surface resources from damage due to mining." Wilkinson and Anderson, *Land and Resource Planning in the National Forests*, 64 Or.L. Rev. 1, 267 (1985). In its most recent planning efforts, the Forest Service has been able to balance the various competing uses on federal forest lands and to maintain "the reasonableness of the overall regulatory mix." G.R. App. A:10. A separate state land use final permit authority would thwart this planning effort.[69] State final permit authority would

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[69] Nothing in the Forest Service's Memorandum of Understandings ("MOU") (C.C.B., p. 12 n.15 and n.16) support the proposition that the state has final land use permit authority over unpatented mining claims on federal lands. *See* J.S. App. A:88—133 for a reprint of the MOUs.

The MOUs merely provide for cooperation between the federal government and the state, a fact not disputed by either the Court of Appeals or Granite Rock. G.R.App. A:9.

The MOUs recognize the "statutory right for persons to prospect and mine on National Forest System land open to operation of the 1872 Mining Law, providing they comply with the rules and regulations covering federal public lands involved." *See, e.g.*, J.S. App. A:113. Moreover, the MOUs define the respective limits of federal and state authority by providing that the county will comment on Forest Service regulated mining operations on federal lands, and the Forest Service will comment on county regulated mining activities "*on private lands* within or adjacent to the National Forest." J.S. App. A:115. [Emphasis added.] Under the MOUs, the Forest Service is still the final decision-maker over whether or not mining is to be permitted on unpatented mining claims on federal lands.

To permit, as here, a state to prohibit mining activities of over two years in duration would directly contravene a policy underlying the MOUs ". . . to keep procedural impacts on the miner to a minimum." J.S. App. A:116. It is also significant to note there is no MOU for Monterey County, the county within which Granite Rock's mining operations are located.

conflict with all Forest Service sanctioned uses including mining, forestry, grazing, etc.

B. The Forest Service or BLM May Prohibit Mining If It Unduly Harms Surface Resources

Since the enactment of the Forest Service regulations and the planning acts for the BLM and the Forest Service, the Forest Service has increased its regulation of mining and forest lands.

The actual mining claims are also subject to considerable federal discretion. For instance, the federal government may challenge the location of a valuable mineral and thereby determine the validity of the claim at any time until the patent issues. *Best v. Humboldt Placer Mining Co.*, 371 U.S. at 336-38, *quoting Cameron v. United States*, 252 U.S. at 459-60.

The federal government also has authority to condition mining upon compliance with regulations designed to protect the surface resources and environment. *E.g., United States v. Goldfield Deep Mines Co. of Nevada*, 644 F.2d 1307 (9th Cir. 1981), *cert. den.* 455 U.S. 907 (1982); *United States v. Weiss*, 642 F.2d at 298-299; *United States v. Richardson*, 599 F.2d at 292-295. The Forest Service has denied plans of operations. *See e.g., United States v. Brunskill*, 792 F.2d 938 (9th Cir. 1986).

Most importantly, the federal government has the right to terminate mining on federal lands. The mineral interest may revert to the United States [43 U.S.C. § 1744] if the mining claimant fails to perform the annual assessment work required by 30 U.S.C. § 28. Additionally, the United States may at any time elect to withdraw lands from mineral entry [43 U.S.C. § 1714] or it may condemn the land and thus prevent any future mining activity. *North American Transportation & Trading Company v. United States*, 53 Ct. Cl. 424 (1919), *aff'd.* 253 U.S. 330 (1920).

The Coastal Commission (C.C.B., p. 10) relies on a MOU from the State of Washington as "acknowledging" state police power authority. In reality, the State of Washington MOU expressly states that surface mining of unpatented mining claims on federal forest lands will come under the surveillance of the Washington Surface-Mined Reclamation Act. J.S. App. A:108. This is an express delegation of authority, not an acknowledgment that such authority exists. In contrast, there is no such delegation in the California MOU. J.S. App. A:88-91.

While the mineral claimant has a possessory interest in the mineral estate, it does not have the right to use the surface estate for non-mineral purposes or to exclude other users of the surface estate except insofar as they interfere with mining operations. 30 U.S.C. § 612.

C. The United States and No One Else Has Complete Control Over the Patenting Process

Congress has clearly set forth standards and conditions for issuance of a patent by the Secretary of the Interior. 30 U.S.C. § 21 *et seq.*, 43 C.F.R. §§ 3861.1 *et seq.* (1985). If these congressional requirements are met, the Secretary implements the will of Congress by issuance of the patent. If the conditions prescribed by Congress are not met, the Secretary must implement the will of Congress and deny the patent.

Contrary to the Coastal Commission's assertions, obtaining a patent of a mining claim is an extremely costly and lengthy process which entails much more effort and contingency than a simple payment of $5 per acre of land. Declaration of Roger Jeppson, mining law expert, J.A. 97-98. The procedural steps to be taken in the application for a mineral patent are quite complex. *See* 43 C.F.R. § 3861.1 *et seq.* It is not uncommon for the patent application procedure to last for over ten years. Even so, the issuance of a patent is not automatic and may be rejected. J.A. 99.

V

THE COASTAL ZONE MANAGEMENT ACT EXPRESSLY LIMITS TO CONSISTENCY REVIEW THE COASTAL COMMISSION'S PROPER REGULATORY ROLE OVER GRANITE ROCK'S UNPATENTED MINING CLAIMS

A. The Coastal Zone Management Act is a Conscious Congressional Choice: It Implements the Policy of Cooperative Federalism

In 1972, the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451 *et seq.*, was passed into law. The CZMA brought order to a very complex set of relationships between federal and state governments concerning management of the natural resources along the nation's coastlines. The CZMA established a strong policy of cooperative federalism. 16 U.S.C. § 1452.

"Federal lands in the west are generally not subject to any form of state management or administration. State planning and zoning laws stop dead at the federal fence." Babbitt, 12 *Environ. Law* at 853. In adopting the CZMA, Congress did not change this state of affairs, and specifically rejected the option of delegating state permit authority over federal lands. Alternatively, the CZMA grants the state limited power to regulate through coastal management plans and consistency review. 16 U.S.C. § 1456(c). By its own admission[70], the Coastal Commission waived exercise of consistency review. The Coastal Commission is not only asking this Court to salvage the Commission from its waiver, but is asking for judicial expansion of its power under the CZMA into final permit authority. Such power is specifically disallowed by the plain language of the CZMA and is preempted by the CZMA's statutory scheme.

B. State Permit Authority Over the Subject Federal Lands Is Precluded by Plain Language of 16 U.S.C. § 1453(1)

The plain language of 16 U.S.C. § 1453(1) clearly removes the subject national forest lands from the Coastal Commission's permit authority. Section 1453(1) states in pertinent part:

> Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

The federal government controls the use of its lands by private parties and the public. Thus, the federal government and no one else has the sole discretion to open its lands for public or private use. Whether mining (or any other use) will be allowed on federal lands is subject solely to federal discretion and Granite Rock holds its mining claims only because the federal government has exercised its discretion over the use of its mineral lands.

It is erroneous to interpret § 1453(1) to mean "lands used solely by the federal government." This interpretation would practically define the exclusion out of existence as most federal lands are open to multiple use by the public and private parties.

The Coastal Commission, through California's Coastal Management Program, specifically recognizes that "all lands owned by the federal government are excluded from the California coastal

[70] *See* C.C.B., p. 14 n.21.

zone" unless judicial, legislative or administrative modification of § 1453(1) should occur. *See* Chapter 11 of the California Coastal Management Program, J.A. 105-106.

C. Mining Claims Do Not Remove Federal Lands from Federal Discretion

The Coastal Commission attempted to remove semantically the subject federal lands from federal discretion by claiming that a holder of a "perfected" unpatented claim has more rights against the United States than a holder of an "unperfected" unpatented claim. With regard to unpatented mining claims, the prospector either locates a valid mining claim or he does not. There is no location of a claim without the discovery of a valuable mineral within its limits. 30 U.S.C. § 23; *Cole v. Ralph*, 252 U.S. 286 (1920); *Waskey v. Hammer*, 223 U.S. 85 (1912); *Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co.*, 167 U.S. 108 (1897). Similarly, the Coastal Commission's use of a "patentable" mining claim is unfounded. *See* C.C.B., p. 9.

The only relevant distinction made in the mining laws of the United States is between a patented and unpatented claim. (*See generally*, 30 U.S.C. § 21, *et seq.*). The mining claims located by Granite Rock are nothing more and nothing less than unpatented mining claims, which claims are subject to federal discretion and control pursuant to the Property Clause.[71] See part II.A. and B., *supra*, for a discussion of the considerable discretion the federal government wields over unpatented mining claims.

D. This Court's Decision in *Secretary of the Interior v. California* Is Controlling

Secretary of the Interior v. California, 464 U.S. 312 (1984) recognized that the CZMA and its implementing regulations establish a policy of cooperative state and federal regulation of the

[71] Any reference to the term "perfected mining claim" (*e.g. Wilbur v. Krushnic*, 280 U.S. 306, 316-317 (1930) simply represents this Court's attempt to explain that a discovery of valuable minerals has been made within the limits of the claim, thereby resulting in the location of an unpatented mining claim. *See* 30 U.S.C. § 23. Without such a discovery, no rights whatsoever are acquired against the United States. *See Union Oil Co. v. Smith*, 249 U.S. 337, 346-347 (1919). The distinction, therefore, has no meaning in an adjudication of the relative rights of the claimant and the United States.

Coastal Zone. *Id.* at 316. *See also* 16 U.S.C. § 1452. This policy of cooperative federalism is manifest in the interplay between the federal lands exclusion provision (16 U.S.C. § 1453(1)) and the consistency provisions of the CZMA. 16 U.S.C. § 1456. *Secretary of the Interior* recognized that the legislative history demonstrates that the adopted version of the CZMA was a compromise between the Senate and House versions whereby all federal lands were excluded from a state's coastal zone pursuant to § 1453(1), but where the state obtained some regulatory participation over the uses of excluded land through the consistency provisions at § 1456.[72] 464 U.S. at 323-324.

Thus, *Secretary of the Interior* has correctly interpreted the § 1453(1) exclusion to reach all federally-owned lands, regardless of use.

> CZMA defines the "coastal zone" to include state *but not federal lands* near the coastline of the several coastal states . . .
>
> [¶]This exclusion [Section 1453(1)] would reach federal parks, military installations, Indian reservations, and other

[72] The Coastal Commission's argument below that 16 U.S.C. § 1456(c)(2) would have little meaning if all federally-owned lands are excluded from the coastal zone is disingenuous. The California Attorney General has recognized occasions (*e.g.* when the Army Corps of Engineers develops projects on non-federal lands) when the federal government can develop non-federal lands within the coastal zone. *See* 57 Ops.Cal.Atty.Gen. 42, 45 (1974).

Furthermore, the Coastal Commission's suggestion below that § 1453(1) does not exclude the subject lands because they were not regulated by the federal government prior to 1974 (when the Forest Service regulations were adopted) is conjecture. As early as 1942, the Secretary of Agriculture required uses of federal lands to be authorized by federal special use permits. *Freese v. United States,* 6 Cl.Ct. at 11-12 *citing* 7 Fed.Reg. 7,178 (1942). Further, the Secretary of Agriculture had power to regulate the subject lands under the Organic Administration Act, 16 U.S.C. §§ 478 & 551, *United States v. Richardson,* 599 F.2d at 292.

> federal lands that would lie within the coastal zone *but for the fact of federal ownership.*

Id. at 315, 323. [Emphasis added.][73]

E. The CZMA's Legislative History Demonstrates Congressional Intent to Exclude All Federal Lands From the State's Permit Authority

In *Secretary of the Interior,* this Court relied almost exclusively upon the CZMA's legislative history in interpreting the CZMA. The CZMA's legislative history is clear: federal lands are excluded from a state's coastal zone without qualification. Any attempt to characterize the CZMA's clear legislative history as ambiguous completely fails.

In enacting the CZMA, the Conference Committee adopted the Senate's language with respect to § 1453(1). The *definitional* section of the Senate report provides that federal forest lands are excluded from a state's coastal zone.

> The coastal zone is meant to include the non-Federal coastal waters and the non-Federal land beneath the coastal waters, *and the adjacent non-Federal shore lands* including the waters therein and thereunder. . . .
>
> [The Act] does . . . not convey, release, or diminish any rights . . . possessed by the Federal Government . . . or extend State authority to land subject solely to the discretion of the Federal Government, such as national parks or *forests* . . .

S.Rep. No. 753, 92nd Cong.2d Sess., 1972 U.S. Code Cong. & Ad. News 4776, 4783. [Emphasis added.]

The Conference Committee's report further provided that the appropriate state regulatory role under the CZMA is consistency review:

[73] *Secretary of the Interior* specifically construed the entire CZMA, particularly the interrelationship between the § 1453 exclusion and the § 1456 consistency provisions, in reaching its ruling on § 1456(c)(1) rather than § 1456(c)(3), which is at issue here.

> "Section 307(c)(1)'s directly affecting language was aimed at activities conducted or supported by federal agencies on *federal lands physically situated in the coastal zone but excluded from the zone as formally defined by the Act.*" 464 U.S. at 330. [Emphasis added.]

This rationale is directly applicable here.

> The Conferees also adopted the Senate language in this section which *made it clear that federal lands are not included within a state's coastal zone.* As to the use of such lands which would affect a state's coastal zone, the provisions of Section 307(c) [consistency review] would apply.

CZMA Conf. Rep. No. 1544, 92nd Cong. 2d Sess., 1972 U.S. Code Cong. & Ad. News 4776, 4822. [Emphasis added.]

No expression of legislative intent could be more clear: federal lands are excluded from a state's coastal zone without limitation.

F. NOAA's Interpretation of Section 1453(1) Excluding All Federal Lands Is Entitled to Deference

Because of the clear language in *Secretary of the Interior* interpreting § 1453(1), as well as the unambiguous Congressional intent, this Court has held no further inquiry is necessary and effect must be given "to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 104 S.Ct. 2778, 2781-82 (1984). Assuming *arguendo* an ambiguous statute and unclear Congressional intent, this Court has recognized that great deference is to be afforded to an administering agency's statutory interpretation. *Id.* at 2782-2783; *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).[74]

The National Oceanic & Atmospheric Administration's ("NOAA") regulations interpreting section 1453(1) state that all lands owned by the federal government are excluded from the definition of a coastal zone. 15 C.F.R. § 923.33(a) (1986).[75]

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[74] If a statute is silent or ambiguous with respect to a specific issue, courts abide by administrative regulations unless the regulation is contrary to clear Congressional intent or if it is based on an impermissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 104 S.Ct. at 2782-2783. Furthermore, *Chevron* held that a court may not substitute its own construction of a statute for a reasonable interpretation made by the administering agency. *Id.* at 2782.

[75] 15 C.F.R. § 923.33(a) states:

> "States must exclude from their coastal management zone those lands owned, leased, held in trust or whose use is otherwise by law subject solely to the discretion of the Federal Government, its officers and agents."

In response to a request from NOAA, the Assistant Attorney General, Office of Legal Counsel, United States Department of Justice issued an opinion on August 10, 1976, which advised NOAA that 16 U.S.C. § 1453(1) excludes all lands owned by the United States from the definition of the coastal zone.[76]

NOAA's interpretation is consistent with the plain language of § 1453(1), as well as this Court's interpretation of and the legislative history of § 1453(1), and is therefore an eminently reasonable interpretation of the statute.[77]

G. CZMA Consistency Review Is Congress' Answer to the Issue of State Regulation of Federal Lands

Despite the Coastal Commission's urging to the contrary throughout its brief, Granite Rock does not suggest that the federal forest lands on which its unpatented mining claims are located are "immunized from state regulation" altogether. Rather, the legislative history demonstrates that in order to establish a policy of cooperative state and federal regulation of the coastal zone, Congress enacted a compromise which allows the state some regulatory participation over the uses of excluded lands through consistency review. 16 U.S.C. § 1456. *Secretary of the Interior,* 464 U.S. at 323-324. State permit power is preempted by the CZMA, which specifically grants to the states the limited power of consistency review, but not final permit authority.[78]

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[76] *See* J.A. 85-95 for the full text of the Department of Justice's opinion.

[77] Congress selected NOAA to administer the CZMA because it was the "best qualified agency to undertake this complex task because of its capabilities for dealing with the interaction of the land and water problems." S.Rep. No. 753, 92nd Cong.2nd Sess., 1972 U.S. Code Cong. & Ad. News 4776, 4784. Three years after the initial promulgation of the CZMA, the Senate applauded NOAA for its able administration of the Coastal Zone Management Program. S.Rep. No. 277, 94th Cong.2d Sess. 7, 1976 U.S. Code Cong. & Ad. News 1768, 1774.

[78] State permit authority would interfere with and frustrate the full effectiveness of the CZMA and is hence preempted. *Perez v. Campbell,* 402 U.S. 637, 652 (1971); *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 211 (1824).

In the relevant consistency provisions of 16 U.S.C. § 1456, Congress gave the Coastal Commission a clearly defined, limited role concerning private use of federal lands which lie within the geographical limits of the coastal zone. Section 1456 establishes consistency review as the only vehicle for state regulatory participation regarding activities by a private party for which a federal permit, license or approval is required. *See* § 1456(c)(3)(A).[79]

Consistency review is an exhaustive procedure whereby states are given the opportunity to comment on federal and private activities. The state's comments are considered *before* federal approvals are granted. Final authority, however, is reserved to the federal government.[80] In 1981, the Coastal Commission had an opportunity to review Granite Rock's federally approved Plan of Operations for consistency, pursuant to 16 U.S.C. § 1456, but admittedly waived its right to do so.

The purpose of the consistency review provisions was to avoid a conflict between federal and state regulations by enabling a state to comment regarding activities which were otherwise excluded from the coastal zone and hence were not subject to direct regulation. Conf. Rep. No. 1544, 92nd Cong. 2d Sess., 1972 U.S. Code Cong. & Ad. News 4776, 4822. Congress intended to "foster intergovernmental cooperation and minimize duplicative effort and unnecessary delay . . . " 15 C.F.R. § 930.1(c) (1986).

Absent a clear and unambiguous cession of regulatory power over federal land to a state, that power continues to reside in the United States by virtue of the Property Clause. If Congress had intended to delegate its authority over federal lands to the states and to give the states the authority to regulate these lands, it is difficult to believe that such a revolutionary concept would not have been expressly stated. There is no language in the CZMA which even hints that such a grant of power was intended. In fact, the legislative history indisputably demonstrates that Congress expressly rejected this approach when it enacted §§ 1453(1) and 1456.

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[79] Defined as "any authorization, certification, approval or other form of permission which any federal agency is empowered to issue to an applicant." 15 C.F.R. § 930.51 (1986).

[80] *See e.g.*, 15 C.F.R. §§ 930.54, 930.110, 930.112(b) (1986).

The latitude of regulatory authority afforded by Congress to the Coastal Commission under the CZMA consistency provisions is wide. However, it is not wide enough to include the final permit authority the Coastal Commission sought in its letter of October 17, 1983, which spawned the instant litigation. Congress has reserved the final decision-making authority over activities on federal land to the federal government. In the case of activities which affected the surface resources in the Los Padres National Forest, Congress has delegated its reserved decision-making authority to the Forest Service.

Granting the Coastal Commission permit authority over private activities on federal lands impermissibly conflicts with the Congressional purpose in enacting the CZMA and is hence preempted.

CONCLUSION

Granite Rock Company respectfully submits that this appeal should be dismissed and certiorari denied. Alternatively, Granite Rock submits that the judgment of the Court of Appeals was correct, and for any of the above reasons, the judgment in favor of Granite Rock Company should be affirmed.

Respectfully Submitted,

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Appendix A

Organic Administration Act Provisions; Title 16, U.S. Code

§ 478. Egress or ingress of actual settlers; prospecting

Nothing in sections 473 to 478, 479 to 482 and 551 of this title shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of national forests, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of Agriculture. Nor shall anything in such sections prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests.

§ 551. Protection of national forests; rules and regulations

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this section, sections 473 to 478 and 479 to 482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section 3401(b) to (e) of Title 18.

Appendix B

Selected Provisions of Coastal Zone Management Act; Title 16, U.S. Code

§ 1452. Congressional declaration of policy

The Congress finds and declares that it is the national policy—

(1) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the nation's coastal zone for this and succeeding generations;

(2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development, which programs should at least provide for—

(A) the protection of natural resources, including wetlands, floodplains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife and their habitat, within the coastal zone,

(B) the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas and in areas of subsidence and saltwater intrusion, and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands,

(C) priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation, and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists,

(D) public access to the coasts for recreation purposes,

(E) assistance in the redevelopment of deteriorating urban waterfronts and ports, and sensitive preservation and restoration of historic, cultural, and esthetic coastal features,

(F) the coordination and simplification of procedures in order to ensure expedited governmental decisionmaking for the management of coastal resources,

(G) continued consultation and coordination with, and the giving of adequate consideration to the views of, affected Federal agencies,

(H) the giving of timely and effective notification of, and opportunities for public and local government participation in, coastal management decisionmaking, and

(I) assistance to support comprehensive planning, conservation, and management for living marine resources, including planning for the siting of pollution control and aquaculture facilities within the coastal zone, and improved coordination between State and Federal coastal zone management agencies and State and wildlife agencies; and

(3) to encourage the preparation of special area management plans which provide for increased specificity in protecting significant natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas, and improved predictability in governmental decisionmaking; and

(4) to encourage the participation and cooperation of the public, state and local governments, and interstate and other regional agencies, as well as of the Federal agencies having programs affecting the coastal zone, in carrying out the purposes of this chapter.

§ 1453. Definitions

For the purposes of this chapter—

(1) The term "coastal zone" means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct

and significant impact on the coastal waters. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

* * *

§ 1456. Coordination and cooperation

(a) Federal agencies

In carrying out his functions and responsibilities under this chapter, the Secretary shall consult with, cooperate with, and, to the maximum extent practicable, coordinate his activities with other interested Federal agencies.

(b) Adequate consideration of views of Federal agencies

The Secretary shall not approve the management program submitted by a state pursuant to section 1455 of this title unless the views of Federal agencies principally affected by such program have been adequately considered.

(c) Consistency of Federal activities with State management programs; certification

(1) Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

(2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs.

(3)(A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public

hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

(B) After the management program of any coastal state has been approved by the Secretary under section 1455 of this title, any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land use or water use in the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with such state's approved management program and will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information, and until—

(i) such state or its designated agency, in accordance with the procedures required to be established by such state pursuant to subparagraph (A), concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence;

(ii) concurrence by such state with such certification is conclusively presumed as provided for in subparagraph (A),

except if such state fails to concur with or object to such certification within three months after receipt of its copy of such certification and supporting information, such state shall provide the Secretary, the appropriate federal agency, and such person with a written statement describing the status of review and the basis for further delay in issuing a final decision, and if such statement is not so provided, concurrence by such state with such certification shall be conclusively presumed; or

(iii) the Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

If a state concurs or is conclusively presumed to concur, or if the Secretary makes such a finding, the provisions of subparagraph (A) are not applicable with respect to such person, such state, and any Federal license or permit which is required to conduct any activity affecting land uses or water uses in the coastal zone of such state which is described in detail in the plan to which such concurrence or finding applies. If such state objects to such certification and if the Secretary fails to make a finding under clause (iii) with respect to such certification, or if such person fails substantially to comply with such plan as submitted, such person shall submit an amendment to such plan, or a new plan, to the Secretary of the Interior. With respect to any amendment or new plan submitted to the Secretary of the Interior pursuant to the preceding sentence, the applicable time period for purposes of concurrence by conclusive presumption under subparagragh (A) is 3 months.

(d) Applications of local governments for Federal assistance; relationship of activities with approved management programs

State and local governments submitting applications for Federal assistance under other Federal programs affecting the coastal zone shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program for the coastal zone. Such applications shall be submitted and coordinated in accordance with the provisions of section 6506 of Title 31. Federal agencies shall not approve proposed projects that are inconsistent with a coastal state's management program, except upon a finding by the Secretary that such project is consistent with the purposes of this chapter or necessary in the interest of national security.

(e) Construction with other laws

Nothing in this chapter shall be construed—

(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters; nor to displace, supersede, limit, or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects;

(2) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies; nor to affect the jurisdiction, powers, or prerogatives of the International Joint Commission, United States and Canada, the Permanent Engineering Board, and the United States operating entity or entities established pursuant to the Columbia River Basin Treaty, signed at Washington, January 17, 1961, or the International Boundary and Water Commission, United States and Mexico.

(f) Construction with existing requirements of water and air pollution programs

Notwithstanding any other provision of this chapter, nothing in this chapter shall in any way affect any requirement (1) established by the Federal Water Pollution Control Act, as amended [33 U.S.C.A. § 1251 et seq.], or the Clean Air Act, as amended [42 U.S.C.A. § 7401 et seq.], or (2) established by the Federal Government or by any state or local government pursuant to such Acts. Such requirements shall be incorporated in any program developed pursuant to this chapter and shall be the water pollution control and air pollution control requirements applicable to such program.

(g) Concurrence with programs which affect inland areas

When any state's coastal zone management program, submitted for approval or proposed for modification pursuant to section 1455 of this title, includes requirements as to shorelands which also would be subject to any Federally supported national land use

program which may be hereafter enacted, the Secretary, prior to approving such program, shall obtain the concurrence of the Secretary of the Interior, or such other Federal official as may be designated to administer the national land use program, with respect to that portion of the coastal zone management program affecting such inland areas.

(h) Mediation of disagreements

In case of serious disagreement between any Federal agency and a coastal state—

(1) in the development or the initial implementation of a management program under section 1454 of this title; or

(2) in the administration of a management program approved under section 1455 of this title;

the Secretary, with the cooperation of the Executive Office of the President, shall seek to mediate the differences involved in such disagreement. The process of such mediation shall, with respect to any disagreement described in paragraph (2), include public hearings which shall be conducted in the local area concerned.

Appendix C

Selected Provisions of National Forest Management Act; Title 16, U.S. Code

§ 1612. Public participation

(a) Adequate notice and opportunity to comment

In exercising his authorities under this subchapter and other laws applicable to the Forest Service, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs.

(b) Advisory boards

In providing for public participation in the planning for and management of the National Forest System, the Secretary, pursuant to the Federal Advisory Committee Act (86 Stat. 770) and other applicable law, shall establish and consult such advisory boards as he deems necessary to secure full information and advice on the execution of his responsibilities. The membership of such boards shall be representative of a cross section of groups interested in the planning for and management of the National Forest System and the various types of use and enjoyment of the lands thereof.

Appendix D

Selected Provisions of Mining Act of 1872, as amended; Title 30, U.S.C.

§ 21. Mineral lands reserved

In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

§ 21a. National mining and minerals policy; definition of minerals; execution of policy under other authorized programs; report to Congress

The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physicai environment that may result from mining or mineral activities.

For the purpose of this section "minerals" shall include all minerals and mineral fuels including oil, gas, coal, oil shale and uranium.

It shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority under such programs as may be authorized by law other than this section. For this purpose the Secretary of the Interior shall include in his annual report to the Congress a report on the state of the domestic mining, minerals, and mineral reclamation industries, including a statement of the trend in utilization and depletion of these resources, together with such recommendations for legislative programs as may be necessary to implement the policy of this section.

§ 22. Lands open to purchase by citizens

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

§ 26. Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

§ 28. Mining district regulations by miners: location, recordation, and amount of work; marking of location on ground; records; annual labor or improvements on claims pending issue of patent; co-owners succession in interest upon delinquency in contributing proportion of expenditures; tunnel as lode expenditure

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several coowners to contribute his proportion of the expenditures required hereby, the coowners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall

become the property of his co-owners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of September succeeding the date of location of such claim.

Where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since May 10, 1872; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by this section. On all such valid claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922.

Appendix E

Selected Provisions of Multiple Use Mining Act, Title 30, U.S. Code

§ 611. Common varieties of sand, stone, gravel, pumice, pumicite, or cinders, and petrified wood

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in this subchapter and sections 601 and 603 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in this subchapter and sections 601 and 603 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.

§ 612. Unpatented mining claims

(a) Prospecting, mining or processing operations

Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

(b) Reservations in the United States to use of the surface and surface resources

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however,* That any use of the surface of any such

mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: *Provided further,* That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: *Provided further,* That nothing in this subchapter and sections 601 and 603 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

(c) Severance or removal of timber

Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent therefor, sever, remove, or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States under subsection (b) of this section. Any severance or removal of timber which is permitted under the exceptions of the preceding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management.

Appendix F

Selected Provisions of Federal Land Policy and Management Act, Title 43, U.S. Code

§ 1712. Land use plans

(a) Development, maintenance, and revision by Secretary

The Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.

(b) Coordination of plans for National Forest System lands with Indian land use planning and management programs for purposes of development and revision

In the development and revision of land use plans, the Secretary of Agriculture shall coordinate land use plans for lands in the National Forest System with the land use planning and management programs of and for Indian tribes by, among other things, considering the policies of approved tribal land resource management programs.

(c) Criteria for development and revision

In the development and revision of land use plans, the Secretary shall—

(1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;

(2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;

(3) give priority to the designation and protection of areas of critical environmental concern;

(4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;

(5) consider present and potential uses of the public lands;

(6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;

(7) weigh long-term benefits to the public against short-term benefits;

(8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and

(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under the Act of September 3, 1964 (78 Stat. 897), as amended [16 U.S.C.A. § 460*l*-4 et seq.], and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

(d) Review and inclusion of classified public lands; review of existing land use plans; modification and termination of classifications

Any classification of public lands or any land use plan in effect on October 21, 1976, is subject to review in the land use planning process conducted under this section, and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The Secretary may modify or terminate any such classification consistent with such land use plans.

(e) Management decisions for implementation of developed or revised plans

The Secretary may issue management decisions to implement land use plans developed or revised under this section in accordance with the following:

(1) Such decisions, including but not limited to exclusions (that is, total elimination) of one or more of the principal or major uses made by a management decision shall remain subject to reconsideration, modification, and termination through revision by the Secretary or his delegate, under the provisions of this section, of the land use plan involved.

(2) Any management decision or action pursuant to a management decision that excludes (that is, totally eliminates) one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more shall be reported by the Secretary to the House of Representatives and the Senate. If within ninety days from the giving of such notice (exclusive of days on which either House has adjourned for more than three consecutive days), the Congress adopts a concurrent resolution of nonapproval of the management decision or action, then the management decision or action shall be promptly terminated by the Secretary. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other

resolution with respect to the management decision or action. A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported such a resolution), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same management decision or action. When the committee has reprinted, or has been discharged from further consideration of a resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(3) Withdrawals made pursuant to section 1714 of this title may be used in carrying out management decisions, but public lands shall be removed from or restored to the operation of the Mining Law of 1872, as amended (R.S. 2318-2352; 30 U.S.C. 21 et seq.) or transferred to another department, bureau, or agency only by withdrawal action pursuant to section 1714 of this title or other action pursuant to applicable law: *Provided,* That nothing in this section shall prevent a wholly owned Government corporation from acquiring and holding rights as a citizen under the Mining Law of 1872.

(f) Procedures applicable to formulation of plans and programs for public land management

The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.

§ 1744. Recordation of mining claims

(a) Filing requirements

The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three-year period following October 21, 1976, and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. The owner of an unpatented lode or placer mining claim located after October 21, 1976 shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:

(1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, on a detailed report provided by section 28-1 of Title 30, relating thereto.

(2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.

(b) Additional filing requirements

The owner of an unpatented lode or placer mining claim or mill or tunnel site located prior to October 21, 1976 shall, withing the three-year period following October 21, 1976, file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground. The owner of an unpatented lode or placer mining claim or mill or tunnel site located after October 21, 1976 shall, within ninety days after the date of location of such claim, file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground.

(c) Failure to file as constituting abandonment; defective or untimely filing

The failure to file such instruments as required by subsections (a) and (b) of this section shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner; but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof, or if the instrument is filed for record by or on behalf of some but not all of the owners of the mining claim or mill or tunnel site.

(d) Validity of claims, waiver of assessment, etc., as unaffected

Such recordation or application by itself shall not render valid any claim which would not be otherwise valid under applicable law. Nothing in this section shall be construed as a waiver of the assessment and other requirements of such law.

Appendix G

Selected Provisions from Coastal Zone Management Program Development and Approval Regulations; 15 C.F.R. Part 923 *et seq.* (1986)

§ 923.33 Excluded lands

(a) *Requirement.* States must exclude from their coastal management zone those lands owned, leased, held in trust or whose use is otherwise by law subject solely to the discretion of the Federal Government, its officers or agents. To meet this requirement, States must describe, list or map lands or types of lands owned, leased, held in trust or otherwise used solely by Federal agencies.

. . .

Appendix H

Selected Provisions of California Coastal Act, Cal. Pub. Res. Code § 30000 *et seq.*

§ 30008. Division as coastal zone management program

This division shall constitute California's coastal zone management program within the coastal zone for purposes of the Federal Coastal Zone Management Act of 1972 (16 U.S.C. 1451, et seq.) and any other federal act heretofore or hereafter enacted or amended that relates to the planning or management of coastal zone resources; provided, however, that within federal lands excluded from the coastal zone pursuant to the Federal Coastal Zone Management Act of 1972, the State of California shall, consistent with applicable federal and state laws, continue to exercise the full range of powers, rights, and privileges it now possesses or which may be granted.

§ 30600. Coastal development permit; local government

(a) In addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, on or after January 1, 1977, any person wishing to perform or undertake any development in the coastal zone, other than a facility subject to the provisions of Section 25500, shall obtain a coastal development permit.

(b) Prior to certification of its local coastal program, a local government may, with respect to any development within its area of jurisdiction in the coastal zone and consistent with the provision of Sections 30604, 30620, and 30620.5, establish procedures for the filing, processing, review, modification, approval, or denial of a coastal development permit. Such procedures may be incorporated and made a part of the procedures relating to any other appropriate land use development permit issued by the local government. A coastal development permit from a local government shall not be required by this subdivision for any development on tidelands, submerged lands, or on public trust lands, whether filled or unfilled, or for any development by a public agency for which a local government permit is not otherwise required.

(c) If prior to certification of its local coastal program, a local government does not exercise the option provided in subdivision (b), or a development is not subject to the requirements of

subdivision (b), a coastal development permit shall be obtained from the commission or from a local government as provided in subdivision (d).

(d) After certification of its local coastal program or pursuant to the provisions of Section 30600.5, a coastal development permit shall be obtained from the local government as provided for in Section 30519 or Section 30600.5.

§ 30604. Coastal development permit; issuance; finding

(a) Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200). A denial of a coastal development permit on grounds it would prejudice the ability of the local government to prepare a local coastal program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200) shall be accompanied by a specific finding which sets forth the basis for such conclusion.

(b) After certification of the local coastal program a coastal development permit shall be issued if the issuing agency or the commission on appeal finds that the proposed development is in conformity with the certified local coastal program.

(c) Every coastal development permit issued for any development between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone shall include a specific finding that such development is in conformity with the public access and public recreation policies of Chapter 3 (commencing with Section 30200).

(d) No development or any portion thereof which is outside the coastal zone shall be subject to the coastal development permit requirements of this division, nor shall anything in this division authorize the denial of a coastal development permit by the commission or any regional commission on the grounds the proposed development within the coastal zone will have an adverse environmental effect outside the coastal zone.

(e) No coastal development permit may be denied under this division on the grounds that a public agency is planning or contemplating to acquire the property on, or property adjacent to the property on, which the proposed development is to be located, unless the public agency has been specifically authorized to acquire such property and there are funds available, or funds which could reasonably be expected to be made available within one year, for such acquisition. If a permit has been denied for such reason and the property has not been acquired by a public agency within a reasonable period of time, a permit may not be denied for such development on grounds that such property, or adjacent property, is to be acquired by a public agency when the application for such a development is resubmitted.

REPLY

BRIEF

(17)

No. 85-1200

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In the Supreme Court

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United States

OCTOBER TERM, 1986

CALIFORNIA COASTAL COMMISSION, et al.,
Appellants,

vs.

GRANITE ROCK COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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Big Sur Coast Land Use Plan, Local Coastal Program, Monterey County, California, April 10, 1986, pp. 48, 54-55	11
Coastal Commission December 10, 1985 Recommendation on Resubmitted Land Use Plan for the Big Sur Coast, pp. 12-14	11

No. 85-1200

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CALIFORNIA COASTAL COMMISSION, et al.,
Appellants,

vs.

GRANITE ROCK COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR APPELLANTS

SUMMARY OF ARGUMENT

A. The question in this case is not, as the Solicitor General suggests, whether the states may exercise "planning" control over federally-owned land by defining permissible or prohibited land uses. See S.G. Br., p. 20. California has acknowledged from the very inception of this litigation that it cannot exercise such power.[1] Rather, the state accepts Granite Rock's mining as a given federally-authorized use, and seeks to apply its police power environmental regulation to minimize the adverse effects of that private use of federal lands. Accordingly, the primary question here is whether the statute which authorizes that private use—the 1872 Mining Act—forbids California and other states from applying state environmental controls to the thousands of private mining operations occurring within the states.

The Solicitor General's suggestion that the 1872 Mining Act does not authorize such state environmental regulation, S.G. Br., p. 25, is altogether surprising in light of previous positions taken by the federal government. The Department of the Interior—which administers the 1872 Mining Act and whose interpretation of that Act is entitled to deference—has repeatedly informed the states that the 1872 Mining Act allows state environmental regulation of hardrock mining on federal land.[2] Ever since environmental concerns came to the fore in the 1970s, the federal government has acknowledged in cooperative agreements with

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[1] The Coastal Commission's summary judgment memorandum, which was filed in the district court more than two and a half years ago, stated that "the state is not seeking to *determine* basic uses of federal land: rather, it is seeking to *regulate* a given mining use so that it is carried out in a more environmentally sensitive and resource-protective fashion." Clerk's Record (CR) 36, pp. 41-42 (emphasis in original).

[2] See the October 14, 1980 letter from Secretary of the Interior Andrus to Governor Ed Herschler of Wyoming and the February 1, 1982 letter from James M. Parker, Associate Director, Bureau of Land Management (BLM) to J. Allen Overton, Jr., President, American Mining Congress, which are reprinted in the appendix to this brief. These letters were provided to appellants by the Department of the Interior pursuant to appellants' Freedom of Information Act request.

the states, stated in its regulations and communications, and conducted its own valuable mineral determinations on the assumption that the 1872 Mining Act authorizes state environmental regulation of hardrock mining. See Appellants' Brief (App. Br.), pp. 25-26. It is too late in the day for the Solicitor General to jettison that shared understanding which builds on a century of dual federal and state regulation of mining under the 1872 Mining Act.

B. The Solicitor General tries to shift the focus of this case away from the 1872 Mining Act and the Forest Service regulations in 36 C.F.R. §§ 228 et seq.—which were the basis of the Ninth Circuit's preemption decision—to an entirely new preemption argument based on the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 et seq., and the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600 et seq. The Solicitor General concedes that these federal planning statutes have limited preemptive effect and do not prevent states from imposing "valid, neutrally prescribed pollution control standards to mining activities." S.G. Br. p. 28, n. 27. The Solicitor General also concedes that state and local permit regulation of private mining on federal land was properly upheld in *State ex rel. Andrus v. Click*, 554 P.2d 969 (Idaho 1976), *State ex rel. Cox v. Hibbard*, 570 P.2d 1190 (Or. 1977), and *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984). *Id.* And the Solicitor General concedes that California can apply the environmental and reclamation permit requirements of the California Surface Mining and Reclamation Act to private mining on federal land *Id.*, p. 30 n. 28. But Coastal Act regulation, according to the Solicitor General, is altogether unlike these forms of state regulation: Coastal Act regulation is really "land use planning", not "environmental" regulation, and it supposedly conflicts with federal land use planning under FLPMA and NFMA. The Solicitor General's argument is wholly dependent on his idiosyncratic distinction between "land use planning" and "pollution control" regulation and his arbitrary classification of Coastal Act regulation as "land use planning". While the Coastal Act contains a land use determination component (not implicated here), it is primarily an environmental and resource protection statute that regulates how given uses are carried out; and it is environmental

regulation of private mining—not the authority to determine whether mining on federal land is permissible—that is at issue here. Regardless of the label placed upon it, Coastal Act regulation is indistinguishable from the regulation in *Click*, *Hibbard*, and *Mt. Emmons*, and if the state regulation in those cases was proper, the same conclusion applies here.

C. The Solicitor General's reliance on the excluded lands provision of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1453(1), is also misplaced. The CZMA is neutral in terms of preemptive effect and was not intended to upset the prior allocation of federal and state authority over private mining on federal land. If states can otherwise apply police power environmental controls to hardrock mining under the 1872 Mining Act, then the CZMA did not cut back on that preexisting state authority. The CZMA, after all, was intended to enhance, not restrict, state regulatory authority. See 16 U.S.C. § 1451(i). To conclude otherwise would mean that inland states like Idaho and Colorado—whose police power authority over federal lands is unaffected by § 1453(1) and whose regulation was upheld in *Click* and *Mt. Emmons*—have *more* regulatory authority over private mining on federal lands than do coastal states which participate in the voluntary CZMA program—even though the CZMA's purpose was to encourage state regulation of coastal land use activities. 16 U.S.C. §§ 1451, 1452.

D. The Solicitor General's CZMA discussion also reflects a basic misunderstanding of California's regulation. The CZMA is not the sole source of California's authority to regulate private mining on federal coastlands. The Coastal Act was not enacted solely for purposes of the CZMA program. Rather, as the Ninth Circuit recognized, the Coastal Act is an exercise of "the state's inherent police power [ ]", J.S. App. A-2, which the state would apply to regulate the environmental effects of private mining on federal land even if California had not participated in the CZMA program.[3] Moreover, in 1978 the California Legisla-

[3] The original 1972 Coastal Act was enacted by the people of California as a popular initiative independently of the federal CZMA program. See generally *Pacific Legal Foundation v. California Coastal*

ture confirmed the independent police power roots of Coastal Act environmental controls by expressing its intent to apply the Act to excluded federal lands to the fullest extent permitted by law. See Cal. Stats. 1978, c. 1075, § 2, p. 3296. Neither before nor after passage of the CZMA has California argued that it may determine permissible uses of federal land. But the state Legislature has decided that it will still apply the police power environmental controls of the Coastal Act to private mining on federal lands apart from the CZMA program—just as the inland states can regulate such private mining pursuant to their police power. As the Ninth Circuit recognized, it follows then that the question whether Granite Rock's mining claims fall within the definition of § 1453(1) is irrelevant to disposition of this case. Even if patentable mining claims are excluded lands under § 1453(1)—and we think that the district court correctly decided that they were not[4]—such lands are not excluded from Coastal Act environmen-

Commission, 33 Cal.3d 158, 162-63, 655 P.2d 306 (1982). California's CZMA coastal management program also notes that "[t]he California coastal management effort began prior to the passage of the CZMA and will continue even if Federal [CZMA] approval is not received." State of California Coastal Management Program and Final Environmental Impact Statement, U.S. Dept. of Commerce, National Oceanic and Atmospheric Administration, August 1977, p. 116.

[4] The district court correctly concluded that federal lands in which a miner holds patentable mining claims cannot be said to be "subject *solely* to the discretion of . . . the Federal Government," 16 U.S.C. § 1453(1) (emphasis added). See J.S. App. A-17-23. A miner with a patentable mining claim holds the dominant property interest in such lands and can compulsorily divest the federal government of title merely by paying a nominal fee and applying for a patent. The federal government lacks discretion to authorize uses inconsistent with Granite Rock's mining, lacks discretion to remove Granite Rock or prohibit mining (short of paying compensation), lacks discretion regarding ultimate disposition of title (since a patentable mining claim holder has an absolute right to a patent should it choose to apply for one), and even lacks discretion to ensure that mining continues (since Granite Rock need only perform $100.00 worth of annual assessment work and file yearly claim holding notices to maintain its claim to the exclusion of all others). Granite Rock has sought the best of both worlds: the federal government has no discretionary control over the land by virtue of

tal standards as a matter of state law. And even if patentable claims qualify as § 1453(1) "excluded lands," the Solicitor General concedes that California may still apply non-discriminatory state environmental controls (like those in the Coastal Act) to private mining on such claims.

E. While our disagreement with the Solicitor General is primarily with his characterization of Coastal Act regulation, our disagreement with Granite Rock is more fundamental. Granite Rock contends that the Property Clause preempts *any* state regulation of private activities on federal land unless Congress expressly authorized the state regulation. Section 1453(1), in Granite Rock's view, also converts private mining claims in the coastal zone into exclusive federal enclaves that are immune from any state regulation save that which is affirmatively authorized by federal statute. This would extend the principle of *Hancock v. Train*, 426 U.S. 167 (1976)—which protects federal facilities and which is based on the federal government's sovereign immunity—to purely private activities on federal lands.

Granite Rock's argument is foreclosed by *Kleppe v. New Mexico*, 426 U.S. 529 (1976). In *Kleppe*, this Court indicated that while Congress' Property Clause power extends "without limitations," 426 U.S. at 539, the states may nonetheless apply their police power to federal lands unless Congress displaces such regulation through conflicting federal regulation. *Id.*, at 543-544. The proper preemption principle then is not that the states may not regulate unless Congress affirmatively authorizes it. Rather, the states may concurrently regulate unless Congress displaces such regulation. Here, Congress has not displaced state environmental regulation of private mining on federal land, either under the federal planning acts or the CZMA. Instead, Congress has affirmatively authorized state environmental regulation of hardrock mining under the 1872 Mining Act; and that state regulation does not conflict with the Forest Service's regulation under 36 C.F.R. §§ 228 et seq. Accordingly, under the proper preemption analysis, California's regulation should be upheld.

Granite's Rock's patentable mining claims, yet Granite Rock has stopped just short of getting a patent in an effort to avoid any state regulation.

Finally, Granite Rock's repeated claims that Coastal Act regulation will be applied to prohibit or "veto" all mining mischaracterizes the state's position. California has repeatedly acknowledged that it cannot and will not apply its regulation to prohibit all mining. Granite Rock has simply sought to manufacture an artificial "conflict" in advance of any actual application of state regulation to avoid state environmental controls for its mining.

I

THE PROPERTY CLAUSE AND FEDERAL LAND PLANNING ACTS DO NOT PREEMPT STATE ENVIRONMENTAL REGULATION OF PRIVATE MINING ON FEDERAL LAND

A. In order to focus on the proper preemption principles that apply here, we will summarize what this case is *not* about.

First, the lands that Granite Rock is mining are not part of any federal enclave over which the federal government has acquired exclusive legislative jurisdiction under the Jurisdiction Clause, Art. 1, § 8, cl. 17. Therefore, the fact that the land is federally-owned does not in and of itself oust any and all state regulation. See *Wilson v. Cook*, 327 U.S. 474, 486-488 (1946).

Second, Granite Rock is not a federal instrumentality and is not cloaked with the federal government's sovereign immunity simply because it happens to be mining on federal land. See *Forbes v. Gracey*, 94 U.S. 762 (1876). Accordingly, the principle in *Hancock v. Train*, 426 U.S. 167 (1976), that states may not regulate federal instrumentalities unless Congress affirmatively authorizes such regulation—which is based on federal sovereign immunity—has no application here.

Third, states may not, of their own authority, grant property interests in or rights to use federal lands. See *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917).[5] But that proposition

[5] Granite Rock's attempt to read *Utah Power & Light Co.* as holding that the Property Clause ousts all state regulation that bears on the "use" of federal lands stretches that case beyond the breaking point. The issue in *Utah Power & Light* was whether a private party could use a state eminent domain law to acquire property rights in federal lands without the federal government's consent. The case does not hold that any state regulation that relates to a private party's "use" of federal lands—such as fire prevention laws, water and air pollution controls, building code standards, public safety laws, vehicle and equipment operation standards, and a myriad other police power regulations—are preempted. If the state law in *Omaechevarria v. Idaho*, 246 U.S. 343 (1918), which directly allocated competing sheep and cattle grazing uses of federal land, did not intrude on exclusive federal authority to grant a "right to use" federal lands, *id.*, p. 352, then surely Coastal Act environmental regulation is permissible.

has no relevance here since Coastal Act regulation is not designed or intended to give Granite Rock any property rights in federal land vis-a-vis the federal government.

Fourth, it is also clear that Congress' Property Clause power to establish "needful rules" for federal lands is without limitation and is not narrowly confined to disposing of federal lands and protecting federal property interests. *Kleppe v. New Mexico*, 426 U.S. 529 (1976). But to say that Congress has the power does not answer whether and how Congress has chosen to exercise it. The Property Clause in and of itself was not intended to convert the one-third of the nation that consists of federal lands into forbidden islands, beyond the reach of any state regulation. Rather, states may apply their police power to private activities on federal lands unless and until Congress displaces such regulation through conflicting federal regulation. *Kleppe*, supra, 426 U.S. 543; *Omaechevarria v. Idaho*, 246 U.S. 343, 346 (1918); *McKelvey v. United States*, 260 U.S. 353, 359 (1922); cf. *Colorado v. Toll*, 268 U.S. 228 (1925). This interpretation of the Property Clause not only reflects the nation's history—in which states often filled the regulatory void left by the absence of federal regulation for federal land activities—but it also follows from the essentially interstitial character of federal law. See Bator, Mishkin, Shapiro & Weschsler, *The Federal Courts and the Federal System*, p. 470-471 (1973); cf. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966).

Thus, the applicable preemption principle is that state environmental regulation of private mining on federal land is permissible unless some conflicting federal statute precludes such regulation.

B. The 1872 Mining Act does not preclude state environmental regulation of hardrock mining. The Department of the Interior has repeatedly taken the position that the 1872 Mining Act affirmatively authorizes rather than preempts such state regulation. Secretary of the Interior Andrus' 1980 letter to Governor Ed Herschler of Wyoming states:

> "It has been our view under the mining laws that the States may assert jurisdiction over mining activities on public lands in connection with their own State laws governing environmental protection. This may be done as long as the States' laws are not inconsistent with Federal law. Section 3 of the General Mining Law of 1872 (R.S. § 2322, 30 U.S.C. § 26), specifically preserves this power with respect to State laws governing possessory rights of locators, and we have not read this specific provision to imply that other State power to regulate mining claim activities was not preserved." See Appendix, A1-2.

The Bureau of Land Management's (BLM) comments on its surface use regulations, in referring to state environmental regulation, also note that "part of the authority the states have to regulate mining activity is delegated by Congress in the mining law." 45 Fed. Reg. 78903 (1980). Both BLM and the Forest Service have entered into a host of cooperative agreements with the states over the years, see J.S. App. A-88 133, not because those federal agencies have "delegated" environmental protection authority to the states, but because the states have their own independent regulatory authority, and both governments have a common interest in minimizing unnecessary duplicative regulation. See App. Br., pp. 25-26, 30-34, Appendix, A3-4.

Contrary to Granite Rock's claim, the Coastal Commission does not seek to prohibit all mining via "final" permit authority.[6]

[6] Although Granite Rock continually characterizes Coastal Act regulation as "final" permit authority, we are at a loss to understand why a

The state is well aware that any attempt to flatly prohibit mining as a permissible land use would conflict with Congress' determination in the 1872 Mining Act to open federal lands to mining uses, and that is not an issue in this case.

C. The Solicitor General's argument that the federal planning statutes preempt all Coastal Act regulation is based on the misconception that California seeks to determine permissible and prohibited uses of federal land and thereby supersede federal land use management decisions. However, Coastal Act regulation does not seek to define permissible private uses of federal land but merely to minimize or control the environmental effects of such uses. Accordingly, the state's regulation poses no conflict with federal planning objectives, and is outside the field regulated by the federal planning acts.

The Solicitor General also tries to pigeonhole the Coastal Act as a "land use planning" and not an "environmental" statute. While the Coastal Act has a land use determination component to it,[7] the Act contains a host of environmental standards, which

coastal permit is anymore "final" than any other permit. Nor do we understand the logic of the claim that any regulatory attempt to control how a given use is carried out is necessarily a "veto" of that use.

[7] Under the Act, local governments are required to adopt Local Coastal Programs (LCPs), which are a type of land use plan. See Cal. Pub. Resources Code §§ 30500, 30108.6. The Coastal Commission reviews and approves a local government's LCP, *id.*, §§ 30512-30513, after which the local government obtains authority to issue permits for activities within its jurisdiction. *Id.*, § 30600(d). The standard for issuance of a local government permit after LCP approval is whether the proposed activity is in conformity with the LCP. *Id.*, § 30604(b).

However, in addition to supervising the adoption of LCPs, the Coastal Commission also regulates the adverse environmental effects of particular land uses through its own permit system. *Id.*, § 30600(a), (c). The standard for issuance of a Coastal Commission permit is not conformity with an LCP but conformity with the provisions of Chapter 3 of the Coastal Act, *Id.*, § 30604(a). Chapter 3 contains a host of environmental protection performance standards. The Commission may attach conditions to coastal permits to enforce the environmental standards of the Coastal Act. *Id.*, § 30607. Therefore, the Solicitor General's doubts

may be enforced via permit conditions to regulate how a given mining use is carried out.[8] The California courts view the Act as an example of environmental regulation.[9] Moreover, regardless of labels, the Commission in the past has tailored its application of Coastal Act policies to avoid potential preemption conflicts with federal regulation.[10] Therefore, there is no reason why the envi-

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whether a coastal permit may be used as an administrative vehicle for the enforcement of environmental standards, S.G. Br. p. 19, n. 16, is unfounded and is refuted by the terms of the Coastal Act.

Contrary to Granite Rock's claim, coastal permit authority has not passed to the County of Monterey, because the Commission has not approved the County's ordinances and measures implementing the certified Big Sur Land Use Plan. Even after permitting authority passes to the County, this case will not be moot because the Coastal Commission retains authority to remedy past permit violations which occurred when the Commission was the permitting agency.

[8] See Cal. Pub. Resources Code §§ 30001(b), 30001(c), 30001.5, 30231, 30240, 30251, 30253.

[9] See *CEEED v. California Coastal Zone Conservation Commission*, supra, 43 Cal.App.3d at 318-319 (characterizing 1972 Coastal Act as environmental regulation akin to traditional regulation of nuisances); *Carstens v. California Coastal Commission*, 182 Cal.App.3d 277, 290 (1986) (Coastal Act requires consideration of "environmental" concerns in granting permits); *Leimert v. California Coastal Commission*, 149 Cal.App.3d 222, 230 (1983) (describing "adverse environmental impact" as a concern under the Act); *South Central Coast Regional Commission v. Charles A. Pratt Construction Co.* 128 Cal.App.3d 830, 846, (1982) (noting "overriding environmental policies of the coastal act" and "public interest in environmental regulation evidenced by the coastal act").

[10] Thus, for example, in *Southern Pacific Transportation Co. v. California Coastal Commission*, 520 F.Supp. 800 (N.D. Cal. 1981), the Commission carefully restricted its regulation to the physical removal of an abandoned railroad bed in order to avoid any potential conflict with exclusive Interstate Commerce Commission regulation of the abandonment of rail service. Similarly in *Carstens v. California Coastal Commission, supra*, 192 Cal.App.3d at 281-284, the Commission amended and modified a public access condition previously included in a coastal permit, so as to avoid any conflict with subsequently imposed Nuclear

ronmental standards of the Coastal Act may not be applied via the permit system in such a way as to avoid potential conflicts with federal authority to define permissible uses of federal land.

More generally, the Solicitor General's profferred taxonomy of "pollution control" and "land use planning" regulation is arbitrary and idiosyncratic. *Hibbard*, 570 P.2d 1190, *Click*, 554 P.2d 969, and *Mt. Emmons*, 690 P.2d 231—which are examples of "pollution control" regulation in the Solicitor General's view—all involve requirements that a permit be obtained before certain land use activities can be carried out, with the permit subject to conditions imposed by the permitting authority. Coastal Act regulation is indistinguishable from the regulation in these cases. The Solicitor General also has no quarrel with regulation under the California Surface Mining and Reclamation Act (SMARA), Cal. Pub. Res. Code §§ 2710-93, because that apparently qualifies as "pollution control" regulation. Yet the reclamation standards of SMARA are implemented via local land use ordinances, Cal. Pub. Res. Code §§ 2757, 2774, and SMARA mandated mineral policies are incorporated in local general plans. *Id.*, §§ 2757, 2762. The Big Sur Land Use Plan, for example, expressly incorporates SMARA reclamation requirements.[11] This is not to say that a state may enforce land use plan criteria to prohibit private uses of federal land that the federal government has permitted. But the fact that environmental, public safety, health, and other types of standards are incorporated in "land use planning" documents—which is commonly the case—should not mean that such standards cannot be applied to private activities on federal lands just because those same documents may contain prohibitions of particular land uses that could not be applied against federally permitted uses.

Regulatory Commission safety requirements for a nuclear power plant. The Commission also refused to approve Monterey County's Big Sur Land Use Plan (LUP) unless the County first acknowledged that it could not regulate federal lands in the same fashion as non-federal lands. See Coastal Commission December 10, 1985 Recommendation on Resubmitted Land Use Plan for the Big Sur Court, pp. 12-14.

[11] See Big Sur Coast Land Use Plan, Local Coastal Program, Monterey County, California (April 10, 1986) pp. 48, 54-55.

Finally, the Solicitor General implies that Coastal Commission regulation of private mining is suspect because the Commission is a "planning" agency that implements California's CZMA management program. But the form in which California exercises its police power authority over hardrock mining on federal land should be a matter of state, not federal, choice. Rather then create separate agencies with CZMA and non-CZMA responsibility, the state has consolidated these responsibilities in one agency. If the state can regulate in an area, that should be the end of the Supremacy Clause inquiry, and the particular agency or means selected for enforcing that regulation should be left to the state.

D. The Solicitor General's reliance on the Federal Land Policy and Management Act (FLPMA) is also misplaced because the land use planning mandated by that Act applies only to lands managed by BLM. See 43 U.S.C. § 1702(e). The lands here are managed by the Forest Service. In any event, it is significant that FLPMA carefully distinguishes between state planning for permissible land uses and state environmental regulation. While federal officials need only "coordinate" federal land use planning with state planning efforts, *id.*, § 1712(c)(9), federal officials must ensure "compliance" with state air, water, noise and other environmental or pollution control standards. *Id.*, § 1712(c)(8); see also § 1765(a)(iii), (iv). Therefore, Congress believed that full compliance with state environmental controls would *not* interfere with federal land management and planning under FLPMA, particularly when FLPMA itself does not establish any independent system of environmental controls for federal lands.

Moreover, FLPMA did not alter the essential features of the regulatory system for mining under the 1872 Mining Act. *Id.*, § 1732(b). This is confirmed by BLM's surface mining regulations, 43 C.F.R. §§ 3809-3809.6, which were adopted *under FLPMA*. BLM's regulations not only acknowledge that state environmental regulation of mining is not preempted, *id.*, § 3809.3-1, but specifically note that the 1872 Mining Act authorizes state environmental regulation of hardrock mining. See 45 Fed. Reg. 78903, 78906 (1980). The absence of any intent to

preempt state police power regulation of private mining outside the narrow field of land use determination is also confirmed by 43 U.S.C. § 1733(d) of FLPMA, which authorizes the Secretary of the Interior to cooperate with state regulatory officials "in the enforcement of the laws or ordinances" of a state in connection with the "administration and regulation of the use and occupancy of public lands."

The National Forest Management Act (NFMA) also does not support any preemption conclusion. That Act and the regulations under it speak in terms of planning and multiple use of "renewable" resources. 16 U.S.C. §§ 1601, 1602, 1604(g)(2)(B), (3)(A), 1607; 36 C.F.R. § 219.3 (definitions of "multiple use" and "sustained yield"). Minerals, however, are considered to be "nonrenewable" resources. 36 C.F.R. § 219.1(b)(2). Because NFMA did not change the basic regulatory scheme for hardrock mining under the 1872 Mining Act, the Forest Service does not actually "plan" for mining uses but simply inventories mineral potentials to consider their relationship to renewable resources. *Id.*, §§ 219.1(b)(2), 219.22. NFMA not only left intact state regulatory authority over hardrock mining under the 1872 Mining Act, but it also had no effect on 16 U.S.C. §§ 480 and 551(a), which preserve state police power authority over the national forest system.

There is also no evidence of any kind in this record that California's permit enforcement of mining reclamation and environmental controls would actually conflict with or undermine federal planning functions for the Los Padres National Forest. Nor is there any showing that requiring Granite Rock to obtain a coastal permit would thwart any planning designations or policies for the Los Padres Forest. Indeed, the Los Padres district ranger—the person in the best position to evaluate and call attention to such a conflict—repeatedly indicated in the decision approving Granite Rock's mining plan and in the environmental assessment that Granite Rock should obtain state environmental permits, including a coastal permit. J.S. 36-37, 46, 54.

Finally, Section 601 of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1281, does not support any inference of preemption. That narrowly drawn provison provides that federal

lands which are not being mined may be designated as unsuitable for mining and withdrawn from mining entry if the lands are predominantly urban or suburban in character, or if mining would adversely impact lands used for residential purposes. *Id.*, §§ 1281(b), (d), (f). Section 601 is doubly inapplicable here because the subject lands are already being mined by Granite Rock, and the lands and surrounding area are not urban or residential.

II
THE EXCLUDED LANDS PROVISION OF THE CZMA DOES NOT PREEMPT STATE ENVIRONMENTAL REGULATION OF PRIVATE MINING ON EXCLUDED FEDERAL LANDS

As shown above, states generally have authority to apply environmental controls to private mining being conducted on federal lands both under the 1872 Mining Act and under their own police power. That state authority is not forbidden by the Property Clause nor preempted by the federal planning acts; rather, it is affirmatively authorized by the 1872 Mining Act and has been traditionally recognized by the federal government. The remaining issue in this case is whether California is deprived of that police power authority—which is otherwise enjoyed by inland states—simply because California chose to participate in the voluntary CZMA program which Congress enacted to encourage and enhance state regulation of unique coastal resources.

A. Granite Rock argues 1) that 16 U.S.C. § 1453(1) preempts state environmental regulation of private mining on excluded federal land, and 2) that the Coastal Act incorporates the § 1453(1) exclusion and exempts private mining on excluded federal lands from any Coastal Act regulation as a matter of state law. Both arguments fail.

Section 1453(1) represents a Congressional judgment not to bring lands "subject solely to the discretion of . . . the Federal Government" within the ambit of the CZMA's funding authorization for state coastal planning. But § 1453(1) was not intended to reach beyond the CZMA and preclude types of state regulation

that the state can otherwise enforce independently of the CZMA under its police power. The National Oceanic and Atmospheric Administration's (NOAA) regulation interpreting § 1453(1) directly addresses the issue and provides that:

> "In excluding Federal lands from a State's coastal zone for the purposes of this Act, a state does not impair any rights or authorities that it may have over Federal lands that exist separate from this program." 15 C.F.R. § 923.33(c)(2).[12]

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[12] This regulation grew out of the debate in the federal executive over the scope of the excluded lands provision. The history of the excluded lands debate is described by NOAA's then General Counsel in Brewer, *Federal Consistency and State Expectations*, 2 Coastal Zone Management Journal 315, 320-322 (1976), and by a NOAA senior policy analyst in Shapiro, *Coastal Zone Management and Excluded Federal Lands: The Viability of Continued Federalism in the Management of Federal Coastlands*, 7 Ecology Law Q 1011, 1014-1021 (1979) (hereinafter "Shapiro"). While the Solicitor General urges that NOAA's expert conclusion is that all federally owned and leased lands are excluded, S.G.Br, 10, NOAA originally concluded that the exclusion only covered *federal enclaves* that are subject to exclusive federal legislative jurisdiction. See 40 Fed. Reg. 1686 (1976); Shapiro, 1014. After the Interior Department and other federal agencies objected to NOAA's interpretation, the matter was referred to the Justice Department and NOAA agreed to abide by Justice's interpretation. Shapiro, 1018 n. 40. The Justice Department's August 10, 1976 opinion concluded that the exclusion covered all federally owned lands. A further intra-executive debate then ensued as to whether lands which the federal government held as a lessee were also covered, see 42 Fed. Reg. 43552 (1977), 43 Fed. Reg. 8388 (1978), and NOAA's view that the exclusion did not cover leased lands was again overridden. Shapiro, 1019. Thus, the final excluded lands regulation is the product of the Justice Department's view, not NOAA's, and it could well be subject to little deference in light of the history of "tortured oscillation and indecision" surrounding its adoption. See *Secretary of Interior v. California*, 464 U.S. 312, 320 n. 6 (1984).

In contrast, NOAA's conclusion about the non-preemptive effect of §1453(1) is one of long-standing consistency, see 42 Fed Reg. 43552 (1977); 43 Fed Reg. 8405 (1978); 44 Fed Reg. 18603 (1979), and to our knowledge, no federal agency has ever questioned that interpretation.

NOAA adopted § 923.33(c)(2) to assure the states that they retained whatever independent authority they had to regulate activities on excluded lands apart from the CZMA program. This could be done either under the state's police power (subject to whatever preemption limits that may apply) or under other federal statutes that authorize state regulation of federal land activities.

In 1978, the California Legislature amended the Coastal Act to make clear that this was its intent. The California Legislature had originally provided in Pub. Resources Code § 30008 that federal lands excluded under § 1453(1) were also excluded from the State's definition of the "coastal zone" in the Coastal Act. See Cal. Stats. 1976, c. 1331, § 1, p. 6013. Former section 30008, however, had been enacted in reliance on NOAA's view that §1453(1) only encompassed exclusive federal enclaves. After the Justice Department posited a much broader federal lands exclusion, the Legislature *deleted* this exclusion from its definition of the coastal zone, and amended section 30008 to specify that California would apply the Coastal Act as an independent police power statute to excluded federal lands to the extent permitted by law.[13] Two points follow from this history.

First, Granite Rock's suggestion that this case can be disposed of on state law grounds because the Coastal Act incorporates the federal lands exclusion in § 1453(1) is incorrect. The Coastal Act adopts a *geographic* definition of the "coastal zone", see Pub. Resources Code § 30103, without regard to whether lands in that

[13] Cal. Stats. 1978, c. 1075, § 2, p. 3296, amended § 30008 to provide that "within federal lands excluded from the coastal zone pursuant to the Federal Coastal Zone Management Act of 1972, the State of California shall, consistent with applicable federal and state laws, continue to exercise the full range of powers, rights, and privileges it now possesses or which may be granted." Hawaii also included language in its coastal zone management plan in 1978 that is similar to California's language in § 30008 which states that "the State will continue to exercise those rights and privileges in Federally-owned lands which it now possesses or may in the future possess separate from the National CZMA Act although such lands are excluded from the CZMA Program." See Shapiro, 1020 n. 53.

zone would otherwise qualify as excluded federal lands under § 1453(1). Second, the Solicitor General's suggestion that California has somehow broken faith with the federal government and is unilaterally redefining the terms of the CZMA program, S.G. Br. p. 15, n. 12, is incorrect. 15 C.F.R. § 923.33(c)(2) plainly provides that states may apply their police power to federal lands apart from the CZMA program to the extent otherwise permitted, and that is all that California seeks to do.[14]

The legislative history of the CZMA also confirms that the Act was not intended to preempt state police power authority over private mining on federal lands that otherwise exists apart from the CZMA program. Senate Report 92-753, 92nd Cong., 2d Sess., p. 1 (1972), which was based on the bill that contained the excluded lands provision, stated that "[t]here is no attempt to diminish state authority through federal preemption."

Section 307(e) of the Act, 16 U.S.C. § 1456(e), also disclaimed any intent "to diminish either Federal or state jurisdiction, responsibility, or rights" in certain fields affected by the Act, and provided that the Act should not be construed as "superseding, modifying or repealing existing laws applicable to the various Federal agencies."[15] In short, the CZMA is "neutral" is terms of

[14] Indeed, as a NOAA official noted, "NOAA *encouraged* coastal states to rely on powers granted to them outside of the context of CZMA to share responsibility with federal agencies for the management of federal coastlands." Shapiro, 1020 (emphasis added).

[15] Senate Report 92-753, p. 20, described the precursor to section 307(e) as "a standard clause disclaiming intent to diminish . . . State authority in the fields affected by the act." Congressman Mosher also noted that the Act "does not diminish . . . State jurisdiction, responsibility or rights under other programs and does not supersede, modify, or repeal existing Federal law." 118 Cong. Rec. 26479 (1972); see also 42 Fed. Reg. 43590 (1977). The reference to preserving state jurisdiction in the particular areas of submerged lands and water resources in section 307(e)(1) was not intended to preempt state authority in other areas that were not enumerated. Rather, it simply emphasized the non-preemptive effect of the CZMA in these particularly controversial areas to dispel any implication that the CZMA modified the Submerged Lands Act, 45 U.S.C. §§ 1301 et seq.

preemptive effect and was not intended to upset the prior allocation of federal and state authority over federal lands. See *Secretary of Interior*, supra, 464 U.S. at 324.

The impact of section 307(e) is two-fold. The section not only preserves whatever police power the states may have over private activities on federal lands, but it leaves intact other federal statutes—like the 1872 Mining Act and 16 U.S.C. § 480—which independently authorize state regulation of private activities on federal land apart from the CZMA program.[16]

Granite Rock's interpretation of § 1453(1) does not make sense in light of the general objective of the CZMA to encourage state coastal regulation. See S. Rep. No. 92-753, p.1, H.R. Rep. No. 92-1049, 92d Cong., 2d Sess. pp. 9, 12, 13. It is implausible that at the same time Congress was extending state authority over an exclusive federal enclave like the Outer Continental Shelf, it intended to cut back pre-existing state authority over private mining on federal lands onshore. Granite Rock's interpretation also leads to the bizarre conclusion that inland states—whose police power authority over federal lands is unaffected by § 1453(1)— have *more* regulatory authority over private mining on federal lands within their boundaries than do coastal states which are left with consistency review as the sole means for regulating such activity on federal coastlands.

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[16] *Secretary of Interior* does not undermine these conclusions. That decision notes that under the Senate CZMA bill, activities on excluded federal lands were exempt from consistency review, whereas under the House bill, such activities were subject to consistency review. 464 U.S. at 322-24. The Conference Committee compromised the bills by providing that consistency review would apply to activities on excluded federal lands if the activities "directly affected" the coastal zone, i.e., had spillover effects on non-federal lands. *Id.* at 323. But there is no indication in *Secretary of Interior* or in the legislative history that the Senate or the House intended the legislation to preempt *other* state police power authority over federal lands that existed apart from the CZMA. The legislative compromise that resulted in adoption of the Senate's narrower definition of the "coastal zone" and the "directly affecting" language was merely directed at how state regulation *under the CZMA program* would apply to federal government activities on federal lands.

B. Contrary to Granite Rock's claim, state environmental regulation under the Coastal Act is not duplicative and unnecessary in light of state consistency review under the CZMA. Consistency review is limited solely to those spillover effects that federal land activities have on non-federal lands. States, however, may be legitimately concerned with the adverse environmental effects that occur on-site, on federal lands.[17] California's concern with onsite effects is particularly heightened in a case such as this where the federal lands are subject to patentable mining claims and could easily pass out of federal ownership.[18]

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[17] Granite Rock's suggestion that the Coastal Commission's only environmental objective is to prohibit all mining is incorrect. Because the Commission has not had a chance to review a permit application from Granite Rock, it is difficult to predict the specific environmental issues or conditions that may be reviewed or imposed if and when Coastal Act regulation is actually applied. However, based on its statutory mandate, the Commission could determine that Granite Rock's mining operations should be subject to a number of possible conditions. These might include measures to stabilize slopes and mining debris disposal areas to prevent erosion, landslide hazards or soil slippage, particularly insofar as these may pose a pollution hazard to the Little Sur River, Cal. Pub. Res. Code §§ 30253(2), 30321; measures to minimize impacts on endangered species listed under the California Endangered Species Act, *id.*, § 30240; construction of drainways to minimize impacts on aquifers and preserve ground water supplies and quality, *id.*, § 30321; construction requirements for access and haul roads to ensure safety, and minimize erosion and surface disturbances, *id.*, § 30251; phasing reclamation efforts so that mined areas are reclaimed prior to new excavations, *id.*, § 30251; maintaining necessary buffers around riparian vegetation, *id.*, §§ 30240, 30321; conditions for identifying and protecting archaeological resources, *id.*, § 30244; conditions for the storage, disposal or impoundment of hazardous substances or fuels to minimize spills or accidents, *id.*, § 30232; fire hazard controls, *id.*, § 30253(1); and controls on the generation of dust and particulate matter, *id.*, § 30253(3).

[18] Granite Rock's suggestion that the Commissions's waiver of consistency review should preclude any Coastal Act regulation erroneously assumes that consistency is the *exclusive* means of regulation when it is, in fact, merely *additive* to other state law approvals. See 41 Fed. Reg. 42883 (1976) (NOAA encourages states to consolidate consistency

In sum, the CZMA is irrelevant to disposition of this case and it provides no basis for preempting state environmental regulation of hardrock mining under the 1872 Mining Act.

Dated: November 11, 1986

Respectfully submitted

JOHN K. VAN DE KAMP,
Attorney General of the State of California

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Deputy Attorney General
(Counsel of Record)

Counsel for Appellants

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review with other state permits). There is no reason why the waiver of CZMA consistency review should be a waiver of state police power regulation apart from the CZMA program. Although the record is unclear, it appears that the Coastal Commission staff erroneously believed in 1981 that the Forest Service would issue a special use permit for Granite Rock's mining after approving a plan of operation. Thus, the staff mistakenly thought that consistency review should await subsequent issuance of a special use permit.

APPENDIX

OCT 14 1980

Honorable Ed Herschler
Governor of Wyoming
Cheyenne, Wyoming 82002

Dear Ed:

In our initial response to your letter of June 26, 1980, we agreed to review further your concerns about Federal and State coordination in regulating hardrock mining under the U.S. Mining Laws on public lands administered by the Bureau of Land Management. You subsequently discussed these same concerns with BLM Director Frank Gregg and other Departmental officials.

You requested specifically that a cooperative agreement be worked out prior to the effective date of the regulations rather than after the effective date.

It has been our view under the mining laws that the States may assert jurisdiction over mining activities on public lands in connection with their own State laws governing environmental protection. This may be done as long as the States' laws are not inconsistent with Federal law. Section 3 of the General Mining Law of 1872 (R.S. § 2322, 30 U.S.C. § 26), specifically preserves this power with respect to State laws governing possessory rights of locators, and we have *not* read this specific provision to imply that other State power to regulate mining claim activities was not preserved. Thus, the adoption and implementation of the proposed BLM regulations (43 C.F.R. Part 3809) are not intended to preempt the State of Wyoming in the continued application and enforcement of its laws and regulations governing the conduct of activities pursuant to the United States Mining Laws.

The Bureau's target date for publication of the final 43 C.F.R. Part 3809 regulations is October 1980, with implementation to follow on or about January 1, 1981. My main goal in coordinating with the Mining Law States is to avoid duplication of efforts by the mining industry and the States and Federal regulatory agencies. I suggest that representatives from your office and BLM

meet as soon as possible after the regulations become final to formulate an agreement or memorandum of understanding as to the enforcement and administration of the regulations. You, of course, are free to continue to administer your State laws concerning environmental protection of public lands affected by mining operations.

Any help that you are able to offer in avoiding unnecessary duplication in State/Federal regulations and in reaching a mutually beneficial agreement for the administration of surface management regulations will be appreciated.

Sincerely,

(Sgd) Cece
SECRETARY

FEB 1, 1982

Mr. J. Allen Overton, Jr.
President, American Mining Congress
Suite 300
1920 N Street, N.W.
Washington, D.C. 20036

Dear Mr. Overton:

This is in response to your letter of December 3, 1981, in which you question the applicability of State reclamation laws and regulations to mining operations on public land by means of cooperative agreements.

The purpose of the cooperative agreements is to expedite the administrative process by avoiding duplication of administration and enforcement of State and Federal reclamation requirements for exploration, development, and mining of locatable minerals under the Mining Law of 1872, as amended.

It is our view that States may assert jurisdiction over mining activities on public land, and State law applies to operations on Federal lands unless the State law so seriously conflicts with the Federal mining law that it is preempted. The Mining Law of 1872 specifically preserves the applicability of State Law governing possessory rights to locators, and we have not read this specific provision to imply that other State powers, including those governing environmental protection, were not preserved.

Nothing in the cooperative agreement(s) should be construed as allowing abrogation of the Bureau's authority. The cooperative agreements provide for the States to carry out their authority and responsibilities to the extent that State laws are not in conflict with Federal laws. The adoption and implementation of the Bureau's surface management regulations (43 CFR 3809) are not intended to preempt the States in the continued application and enforcement of their laws and regulations covering activities pursuant to the Mining Law of 1872, as amended.

We do not believe that the cooperative agreements affect the authority or responsibility of either the States or the Bureau. They

are only a means to improve the efficiency and avoid duplication in the administration of respective laws.

At your convenience, we would be pleased to participate in a discussion with you or your representatives concerning this subject.

Sincerely,

/s/ JAMES M. PARKER
Associate Director

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
AUG 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1200

In the Supreme Court of the United States

OCTOBER TERM, 1986

CALIFORNIA COASTAL COMMISSION, ET AL., APPELLANTS

v.

GRANITE ROCK COMPANY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE

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QUESTION PRESENTED

Whether the California Coastal Commission can require a quarry operator that conducts federally authorized mining activities on federal land to obtain a state coastal development permit under California's coastal zone management plan.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1200

CALIFORNIA COASTAL COMMISSION, ET AL., APPELLANTS

v.

GRANITE ROCK COMPANY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE

INTEREST OF THE UNITED STATES

The United States encourages state development of coastal zone management programs through the Coastal Zone Management Act of 1972, 16 U.S.C. (& Supp. II) 1451 *et seq.* In addition, the United States manages federal lands through various statutes, including the Federal Land Policy and Management Act of 1976, 43 U.S.C. (& Supp. II) 1701 *et seq.*, the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*, and the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. 1600 *et seq.* It specifically encourages hardrock mining on federal lands through the Mining Act of 1872, 30 U.S.C. 22 *et seq.*

STATEMENT

Congress enacted the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. (& Supp. II) 1451 *et seq.*, to encourage state development of coastal zone management programs. California later enacted the California Coastal Act of 1976 (Coastal Act), Cal. Pub. Res. Code §§ 30000 *et seq.* (West 1977 & Supp. 1986), which "shall constitute California's coastal zone management program within the coastal zone for purposes of the [CZMA]" (§ 30008 (Supp. 1986)). The issue in this case is whether Granite Rock Company, a quarry operator that conducts limestone mining operations within the Los Padres National Forest

in accordance with the Mining Act of 1872, 30 U.S.C. 22 *et seq.*, and Forest Service regulations, 36 C.F.R. Pt. 228, is subject to the California Coastal Act's permitting requirements. The district court concluded that it is. The court of appeals reversed, holding that federal law precludes the application of state permitting requirements.

1. a. The CZMA was enacted to encourage prudent use of coastal resources through the development and implementation of state management programs for the "coastal zone" (§ 303, 16 U.S.C. 1452). Section 304(a) of the CZMA defines the "coastal zone" to include coastal waters and submerged lands extending "seaward to the outer limit of the United States territorial sea" and shorelands extending "inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters" (16 U.S.C. 1453(1)). Section 304(a) further states (*ibid.*):

> Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

Department of Commerce regulations interpreting Section 304(a) require the states to exclude all federally-owned land from their coastal management programs.[1]

The CZMA authorizes the Secretary of Commerce to provide financial assistance to the states for development of their coastal zone management programs (§ 305, 16 U.S.C. 1454). The state program must be submitted for approval to the Secretary of Commerce (§ 305(h), 306(c), 16 U.S.C. 1454(h), 1455(c)), who assures that the views of the federal agencies principally affected have been adequately considered (§ 307(b), 16 U.S.C. 1456(b)). Once the state management program is approved, federal activities "affecting" the coastal zone are subject to various CZMA consistency requirements (§ 307(c), 16 U.S.C. 1456(c)).[2]

[1] The pertinent regulation provides (15 C.F.R. 923.33(a)):

> *Requirement.* States must exclude from their coastal management zone those lands owned, leased, held in trust or whose use is otherwise by law subject solely to the discretion of the Federal Government, its officers or agents.

b. The California Coastal Act represents, in part, a response to the CZMA's coastal management incentives. The Coastal Act is intended to protect, enhance, and ensure orderly development of California's coastal zone resources (Coastal Act §§ 30001-30002). It specifically requires that, "[i]n addition to obtaining any other permit required by law * * *, any person wishing to perform or undertake any development in the coastal zone [other than certain facilities], shall obtain a coastal development permit" (§ 30600 (Supp. 1986)).

The Act creates the California Coastal Commission and six regional coastal commissions that implement the coastal management provisions (Coastal Act §§ 30300-30305). Each local government within the coastal zone must prepare a "local coastal program" (§§ 30510-30525) which consists of the "local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resources areas, other implementing actions, which, when taken together,

[2] Section 307(c)(1) of the CZMA specifically provides that federal agencies "conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs" (16 U.S.C. 1456(c)(1)). Department of Commerce regulations implementing this provision require federal agencies to prepare a "consistency determination" identifying the direct effects of the federal activity and explaining how the agency has tailored its activity to achieve consistency with the state program. See 15 C.F.R. Pt. 930.

Section 307(c)(3)(A) imposes consistency requirements on most federal licensees and permittees. Applicants for federal licenses or permits are required to supply consistency certifications for any "activity affecting land or water uses in the coastal zone" (16 U.S.C. 1456(c)(3)(A)). The state is then given an opportunity to concur in the certification. If the appropriate state authorities decline to concur, the federal agency from whom the license or permit is sought must reject the application (*ibid.*). The state's veto can be overridden by the Secretary of Commerce, however, if the Secretary finds that the applicant's proposed activity is consistent with the CZMA or is otherwise necessary to support national security (*ibid.*).

meet the requirements of" the Coastal Act at the local level (§ 30108.6 (Supp. 1986)). Once the California Coastal Commission certifies the local coastal program, the local government is responsible for issuing (or declining to issue) coastal development permits (§ 30600(d) (Supp. 1986)). The local government may issue a permit only if "the proposed development is in conformity with the certified local coastal program" (§ 30604(b) (Supp. 1986). A permit is not required for developments that lie outside the coastal zone (§ 30604(d) (Supp. 1986)).

The California legislature specified that the Coastal Act "shall constitute California's coastal zone management program within the coastal zone for purposes of the [CZMA]" (Coastal Act § 30008 (Supp. 1986)). California submitted the Coastal Act, together with other state laws and programs, to the Secretary of Commerce for CZMA review. On November 7, 1977, the Secretary of Commerce approved California's coastal zone management program. 42 Fed. Reg. 60585. See *American Petroleum Institute* v. *Knecht*, 456 F. Supp. 889, 915 (C.D. Cal. 1978), aff'd, 609 F.2d 1306 (9th Cir. 1979).

2. Granite Rock is a California corporation engaged in the business of mining chemical grade white limestone. It presently holds unpatented federal mining claims under the Mining Act of 1872, 30 U.S.C. 22 *et seq.*, on federally owned lands within the Los Padres National Forest. J.S. App. A2.[3]

[3] The Mining Act states that, "[e]xcept as otherwise provided, all valuable mineral deposits in lands belonging to the United States * * * shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States" (30 U.S.C. 22). Persons who locate valuable mineral interests and properly stake their claims "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations" (30 U.S.C. 26). A mining claim is a vested possessory right comparable to an easement. *Black* v. *Elkhorn Mining Co.*, 163 U.S. 445, 450 (1896). The holder of a perfected mining claim may obtain a federal patent to the land by verifying his location of a valuable mining claim, complying with various notice and recording requirements, and paying required fees. See 30 U.S.C. 29; 43 C.F.R. Pt. 3860.

[Continued]

Granite Rock first proposed to develop its mining claims in 1980. The company submitted a five-year plan of operations to the Forest Service in accordance with federal regulations, set forth at 36 C.F.R. Pt. 228, governing mining activities on national forest lands (J.A. 25-34).[4] The Forest Service consulted with state agencies, conducted an environmental assessment, and approved a modified plan of operations in 1981 (*id.* at 35-57). Granite Rock initiated its open pit mining operations shortly thereafter. The California Coastal Commission received notice of Granite Rock's proposed plan of operations, but did not raise timely consistency objections, under Section 307(c)(3)(A) of the CZMA, to Granite Rock's proposal. Appellants' Br. 14, n.21; J.A. 17.

3. On October 17, 1983, the California Coastal Commission advised Granite Rock that the company's mining activities occur within California's coastal zone boundary

[3] [Continued]

The federal government retains broad power over lands subject to mining claims. See *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 20. For example, the United States retains the right to protect the land from trespass or waste. *United States* v. *Nogueira*, 403 F.2d 816, 824 (9th Cir. 1968); *Teller* v. *United States*, 113 F. 273, 280-281 (8th Cir. 1901). The United States also retains extensive authority to regulate the activity of the mining claimant on its unpatented claims. *United States* v. *Goldfield Deep Mines Co.*, 644 F.2d 1307 (9th Cir. 1981); *United States* v. *Weiss*, 642 F.2d 296 (9th Cir. 1981). Finally, lands subject to an unpatented mining claim "remain open for public use except for the restrictions imposed where actual mining or prospecting operations are taking place." *United States* v. *Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1285 (9th Cir. 1980) (footnote omitted).

[4] The Forest Service promulgated its mining regulations as an exercise of its general authority for management of the national forests. See Organic Administration Act of 1897, 16 U.S.C. 478, 551; see also 30 U.S.C. 612. The regulations, which are intended to "minimize adverse environmental impacts on National Forest System surface resources" (36 C.F.R. 228.1), require that holders of unpatented mining claims submit a mining plan describing the precise scope of proposed operations. 36 C.F.R. 228.4-228.5. The regulations also specify environmental quality, safety, restoration, fire prevention, access, and bonding requirements. See 36 C.F.R. 228.8-228.13. The regulations specifically require compliance with federal and state air quality, water quality, solid waste disposal, and fire prevention standards. 36 C.F.R. 228.8, 228.11.

and are therefore subject to regulation under the California Coastal Act (J.A. 22-23). It instructed Granite Rock "to apply to the Coastal Commission for a coastal development permit for any development, as defined in Section 30106 of the Coastal Act, at the site undertaken after the date of this letter" (*ibid.*).[5] Granite Rock immediately filed an action in the United States District Court for the Northern District of California requesting, inter alia, a declaration that the Coastal Commission has no authority to regulate Granite Rock's mining activities within the Los Padres National Forest (*id.* at 7-14).

The district court held that Granite Rock is subject to the Coastal Act's permitting requirements (J.S. App. A11-A32). The court first concluded that the CZMA's federal lands exclusion does not prevent Coastal Commission regulation (*id.* at A17-A23), stating that Congress "did not mean to shield from direct state regulation purely private activity such as commercial mining operations on federal land which are not subject to ultimate federal control" (*id.* at A23). The court then upheld the state permitting requirements under a general preemption analysis, reasoning that states possess concurrent authority to regulate activities on the federal lands in question (*id.* at A23-A31). The court stated that "[a]s long as the state's permit requirement does not render plaintiff's exercise of rights under the Mining Act impossible, no impermissible conflict exists" (*id.* at A28).

The court of appeals reversed (J.S. App. A1-A10). It stated that "even if we assume that the land in question falls within the coastal zone, the legislative history and certain provisions of the CZMA conclusively demonstrate that Congress intended the CZMA *not* to change the status quo with respect to the allocation of state and federal power over lands within the coastal zone" (*id.* at A6).

[5] The Coastal Commission also instructed Granite Rock "to prepare and submit for Coastal Commission review and approval a certification of consistency" in accordance with Section 307(c)(3) of the CZMA. J.A. 22-23. The Commission has since conceded that its failure to raise timely consistency objections resulted in a waiver of its rights under the CZMA consistency provisions. Appellants' Br. 14, n.21; J.A. 17.

Applying federal preemption principles, the court concluded that "Forest Service regulations mandate that the power to prohibit the initiation or continuation of mining in national forests for failure to abide by applicable environmental requirements lies with the Forest Service" and that "an independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority and thus is preempted" (*id.* at A9). It noted that its conclusion "is bolstered by the fact that even the Forest Service is limited in the amount of regulation it may impose as a condition of mining in national forests because of the federal policy to encourage mining on federal lands" (*ibid.*).

The California Coastal Commission appealed to this Court under 28 U.S.C. 1254(2).[6]

[6] We suggest that this Court does not have appellate jurisdiction under 28 U.S.C. 1254(2). The court of appeals did not declare any portion of the California Coastal Act "invalid as repugnant to the Constitution, treaties or laws of the United States" (*ibid.*). Instead, "an exercise of authority under state law [was] invalidated without reference to the state statute" (*Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 247 (1984)). See *Minnesota* v. *Alexander*, 430 U.S. 977 (1977) (dismissing, for want of jurisdiction, an appeal from a decision holding that Army Corps of Engineers dredging projects are exempt from state permitting authority); see also *Hancock* v. *Train*, 426 U.S. 167 (1976) (reviewing an invalidation of state permitting authority by writ of certiorari). And contrary to the Coastal Commission's contentions (Br. 3-4), an invalidation of state law was not the "necessary predicate" for the court's ruling. The California legislature apparently structured its Coastal Act to extend state jurisdiction over federal lands only to the extent that federal law would permit. See Coastal Act § 30008 ("within federal lands excluded from the coastal zone * * * the State of California shall, *consistent with applicable federal and state laws*, continue to exercise the full range of powers, rights, and privileges it now possesses or which may be granted") (emphasis added). Thus, the court of appeals' conclusion that federal law precludes state regulation does not invalidate the state statute. The Court may, of course, treat the appeal as a petition for certiorari. 28 U.S.C. 2103.

We note another potential jurisdictional defect in this case. Granite Rock's five-year plan of operations expired on February 26, 1986 (J.A. 54), and the company has not submitted a new plan for Forest Service review. Once a plan is submitted, Forest Service

INTRODUCTION AND SUMMARY OF ARGUMENT

The California Coastal Commission contends that Granite Rock Company—a quarry operator conducting mining operations on federal land pursuant to a federal mining claim and in accordance with federal regulations—is subject to the land use permitting requirements of California's coastal zone management program. We disagree. The Property Clause vests Congress with the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (U.S. Const. Art. IV, § 3, Cl. 2). Congress has not authorized—and, indeed, has forbidden—the California Coastal Commission's application of state coastal management requirements to federal lands. The Coastal Commission's proposed regulation is specifically prohibited by the CZMA's federal lands exclusion. It is also inconsistent with federal land use principles and the existing programs for managing mining activities on federal lands.

The CZMA directly answers the Coastal Commission's contentions. Section 304(a) of the CZMA provides that states must exclude from their coastal zone management programs "lands the use of which is by law subject solely to the discretion of * * * the Federal Government, its officers or agents". The Department of Commerce—the expert agency charged with implementation of the CZMA—has reasonably interpreted Section 304(a) to require that states exclude all lands "owned, leased, held in trust

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approval is neither automatic nor immediate; moreover, the California Coastal Commission may object, under the CZMA's consistency provisions, to the proposed plan. Hence, the past dispute in this case is arguably moot and any future dispute is arguably unripe. On the other hand, this Court could conclude that the questions presented by the parties should be resolved now because Granite Rock seeks declaratory relief, the issue may recur, and its resolution would materially aid Granite Rock in planning its future development activities. See *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 200-201 (1983). The Coastal Commission briefly discussed the mootness question (Br. 12 n.17). Should the Court desire further guidance on this question, we suggest that it order supplemental briefing by the parties and the United States.

or whose use is otherwise by law subject solely to the discretion of the Federal Government" (15 C.F.R. 923.33(a)). Thus, California's coastal zone management program cannot be applied to federally-owned lands. Indeed, the CZMA specifically provides for state input to federal land use decisions affecting the coastal zone through the "consistency review" process (§ 307(c), 16 U.S.C. 1456(c)). This further corroborates that the California Coastal Commission has no authority to regulate directly activities—including federally authorized mining activities—that occur on federal lands.

The CZMA's provisions reflect general principles of public land law that would preclude the Coastal Commission's proposed application of permitting requirements even in the absence of the CZMA's specific federal lands exclusion. The Property Clause gives Congress "power over the public lands 'to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them * * *.'" *Kleppe* v. *New Mexico*, 426 U.S. 529, 540 (1976) (quoting *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 405 (1917)). Congress, in turn, has given the Department of the Interior and other federal agencies broad authority to manage the federal lands. These agencies, rather than the states, are charged with primary responsibility for federal land management.

Congress has recognized the value of federal-state cooperation in managing the vast public domain. It has therefore employed a variety of mechanisms to give the states a voice in federal land use determinations. For example, the Federal Land Policy and Management Act authorizes the Secretary of the Interior to develop federal land use plans, for Bureau of Land Management lands, in coordination with state and local governments (43 U.S.C. 1712(c)(9)). The Forest and Rangeland Renewable Resources Planning Act contains similar coordination provisions (16 U.S.C. 1604(a)), and, as previously mentioned, the CZMA expressly requires consistency review. Furthermore, Congress, while encouraging private mining activities on federal lands through the Mining Act of 1872, has provided a specific mechanism for accom-

modating state land use interests. Section 601 of the Surface Mining Control and Reclamation Act authorizes the Secretary of the Interior to review, at the request of a Governor or an affected person, whether federal lands may be unsuitable for mining operations based on certain adverse impacts on adjoining lands (30 U.S.C. 1281).

In the present case, both Congress and the Forest Service have attempted to accommodate legitimate state interests. But the fact remains that federal law, rather than state law, ultimately governs the use of federal lands. Federal law—as expressed in the CZMA, the federal land management statutes, the Mining Act of 1872, Section 601 of the Surface Mining Control and Reclamation Act, and the Forest Service regulations—neither authorizes nor leaves room for the California Coastal Commission to apply its coastal zone management permitting requirements to mining activities occurring on national forest lands.

ARGUMENT

THE CALIFORNIA COASTAL COMMISSION CANNOT IMPOSE STATE LAND USE REQUIREMENTS UPON A QUARRY OPERATOR THAT CONDUCTS MINING OPERATIONS ON FEDERAL LAND

A. The Coastal Zone Management Act's federal lands exclusion exempts federal mining claims from regulation under state coastal management programs

The CZMA provides a direct and conclusive answer to the present case. Section 304(a) of the CZMA excludes from the state coastal zone regulation "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents" (16 U.S.C. 1453(1)). The Department of Commerce—the expert agency charged with implementing the CZMA—has concluded in its implementing regulations that Section 304(a) excludes federally-owned land from state regulation (15 C.F.R. 923.33(a)). There is no serious doubt that the Department's regulation is a reasonable interpretation of Section 304(a), that California has agreed to administer its state coastal management program in compliance with this regulation, and that the exclusion applies to all federally-owned lands.

The CZMA accordingly prohibits the California Coastal Commission from applying its permitting requirements to Granite Rock's mining activities within the Los Padres National Forest.

1. The Commerce Department has correctly interpreted Section 304(a) of the CZMA to exclude all federally-owned lands from state coastal management program regulation. The import of Section 304(a)'s language, while not completely free from ambiguity, is fairly discernible. It provides that, if the federal government has "sole[] * * * discretion" over the use of the lands in question, those lands are excluded from the state coastal management program. By its plain terms, it excludes lands that are subject to federal—rather than state—land use control. The exclusion must include, at a minimum, all federally-owned lands. Congress, by virtue of the Property Clause, has " 'complete power' " over their use. See, *e.g.*, *Kleppe* v. *New Mexico*, 426 U.S. 529, 540 (1976) (quoting *United States* v. *City of San Francisco*, 310 U.S. 16, 30 (1940) (footnote omitted)).[7]

The CZMA's legislative history supports that interpretation. Section 304(a)'s federal lands exclusion originated in the Senate bill's definition of the coastal zone. See S. 3507, 92d Cong., 2d Sess. § 304(a) (1972). The accompanying Senate report explained (S. Rep. 92-753, 92d Cong., 2d Sess. 9 (1972)):

> The coastal zone is meant to include the non-Federal coastal waters and the non-Federal land beneath the coastal waters, and the adjacent non-Federal shorelands including the waters therein and thereunder.

The report observed that, as a result of the bill's consistency requirements, "[a]ll federal agencies conducting or supporting activities in the coastal zone are required to administer their programs consistent with approved

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[7] "True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with *full power* in the United States to protect its lands, *to control their use* and to prescribe in what manner others may acquire rights in them." *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404 (1917) (emphasis added).

state management programs" (*ibid.*). It added, however, that the bill would not "extend state authority to land subject solely to the discretion of the Federal Government, *such as national parks, forests and wildlife refuges,* Indian reservations and defense establishments" (*ibid.* (emphasis added)).

The Senate's federal lands exclusion was included in the conference bill. The conference report explained (H.R. Conf. Rep. 92-1544, 92d Cong., 2d Sess. 12 (1972)):

> The Conferees also adopted the Senate language * * * which made it clear that Federal lands are not included within a state's coastal zone. As to the use of such lands which would affect a state's coastal zone, the provisions of section 307(c) [the CZMA consistency provisions] would apply.

The report added that "those lands traditionally managed by the Department of Interior or the Department of Defense, such as parks, wildlife refuges, military reservations, and other such areas covered by existing legislation, were specifically excluded from the coverage of the bill" (*id.* at 13). Furthermore, during the debate on the conference bill, Rep. Mosher, a member of the conference committee, stated that the bill "in no way affects the jurisdictional responsibilities of the Environmental Protection Agency, any other Federal agency, or the Department of the Interior in regard to the administration of Federal lands, since the conferees have specifically eliminated those land areas from the definition of coastal zone" (118 Cong. Rec. 35548 (1972)).[8]

[8] The repeated observation by the conferees that Section 304(a) would exclude "federal lands" is significant. The term "federal lands" is generally used to describe all lands to which the United States holds title. See, *e.g.*, Alaska National Interest Lands Conservation Act, 16 U.S.C. 3102(2); Surface Mining Control and Reclamation Act, 30 U.S.C. 1291(4). See also U.S. Dep't of the Interior Bureau of Land Management, *Public Land Statistics 1985*, at 109; 1 Rocky Mountain Mineral Law Foundation, *American Law of Mining* § 3.02[1] (2d ed. 1985). Thus, the conferees presumably intended that Section 304(a) would exclude, at a minimum, *all* federally-owned lands. The Department of Commerce has concluded that Section 304(a)'s exclusion of lands "the use of which is by law subject solely to the discretion" of the federal government, encompasses lands *leased* to the federal government as well. See 15 C.F.R. 923.33.

Thus, the legislative history of Section 304(a) fully supports—indeed, probably compels—the Commerce Department's interpretation of the federal lands exclusion. That interpretation finds further support in an informal opinion from the Justice Department's Office of Legal Counsel (OLC), issued in 1976 (prior to the promulgation of the regulations), at the request of the General Counsel of the National Oceanic and Atmospheric Administration (NOAA) (J.A. 85-95).[9] The OLC opinion reviews the language and legislative history of Section 304(a) in light of established principles of federal land law, concluding (J.A. 94):

> In short, the plain language of the statute appears to exclude all lands owned by the United States, since the United States has full power over the use of such lands and "sole discretion" with respect to such use. This conclusion is supported by the legislative history of the Act. Nowhere is there any suggestion that Congress intended to exclude some federal land from the Coastal Zone, and hence from State regulation, while including other such land within the Zone.

Finally, the Commerce Department's interpretation is consistent with the provision's apparent purpose—to preserve the independence of federal land use management decisions.[10] Section 304(a) protects the federal govern-

[9] Congress has provided that executive agencies may request the Attorney General to render an opinion "on questions of law" arising in the administration of their departments (28 U.S.C. 512). The Attorney General has delegated authority to provide informal opinions to OLC (28 C.F.R. 0.25.). In this instance, the General Counsel of NOAA sought guidance whether the federal lands exclusion applied to all federally-owned lands or only to ~~those~~ lands subject to federal legislative jurisdiction pursuant to Article I, Section 8 of the Constitution. See J.A. 86.

[10] As the OLC opinion notes (J.A. 93-94), Section 304(a)'s language apparently originated in a Senate bill designed to encourage national land use planning. See S. 3354, 91st Cong., 2d Sess. § 305(b)(1)(A) (1970), *reprinted in* S. Rep. 91-1435, 91st Cong., 2d Sess. 10 (1970). Like the CZMA, that bill specified, as a requirement for federal funding, that state land use plans exclude "lands

ment's established prerogatives over federally-owned lands. See, *e.g.*, *Kleppe* v. *New Mexico*, 426 U.S. 529, 539-540 (1976). "'A different rule,' as was said in *Camfield* v. *United States*, [167 U.S. 518, 526 (1897)], 'would place the public domain of the United States completely at the mercy of state legislation.'" *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 405 (1917). The Commerce Department's interpretation is, moreover, strongly supported by this Court's opinion in *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984). The Court, in the course of describing the CZMA, gave Section 304(a) its natural reading, stating that the federal lands exclusion would "reach federal parks, military installations, Indian reservations, and other federal lands that would lie within the coastal zone but for the fact of federal ownership" (464 U.S. at 323).

In sum, the Commerce Department's interpretation of the CZMA's federal lands exclusion is consistent with the plain language of Section 304(a). To the extent that the statutory language is ambiguous, the agency's interpretation is reasonable and entitled to deference from the courts.[11]

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the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents" (*ibid.*). The Senate report explained (*id.* at 38-39):

> Federal lands and Federal trust-Indian lands are excluded in order that the Federal Government's independence in the management of its lands will not be compromised. The Committee acknowledges the need for improved Federal land use policies * * * but feels that the comprehensive substantive planning responsibilities of the Federal Government with respect to Federal lands should be considered separately from the present legislation, in which the primary substantive responsibilities are vested in State agencies.

The Senate bill did not pass. Congress, however, ultimately did address federal land management through the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, the National Forest Management Act of 1976, and the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. 1600 *et seq.* See pages 21-25, *infra*.

[11] See, *e.g.*, *Japan Whaling Ass'n* v. *American Cetacean Society*, No. 85-954 (June 30, 1986), slip op. 11; *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 5-7; *FDIC* v. *Philadelphia Gear Corp.*, No. 84-1972 (May 27, 1986), slip op. 13; *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9-10; *Chemical Manufacturers Ass'n* v. *NRDC*, No. 83-1013 (Feb. 27, 1985), slip op. 9-10; *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984).

2. The district court, at the California Coastal Commission's urging, concluded that the CZMA's federal lands exclusion should not apply in this case because federal lands subject to mining claims are not "lands the use of which is by law subject solely to the discretion of * * * the Federal Government" (16 U.S.C. 1453(1)). See J.S. App. A17-A23; see also J.A. 22-23. The court of appeals did not reach that question. We note, in the event that the issue arises here, that the Coastal Commission's position is incorrect.[12]

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[12] The California Coastal Commission recently subscribed to its novel interpretation of Section 304(a) in approving the Local Coastal Program for the Big Sur Coast of Monterey County. That local coastal program states:

> As provided by the Federal Coastal Zone Management Act of 1972 (CZMA), lands subject to exclusive federal jurisdiction, such as the Naval Facility at Pt. Sur, are not subject to Coastal Commission or County jurisdiction. However, when federally owned lands are opened to non-federal development, such developments are subject to coastal permit requirements. Accordingly, the land use designations shown for federal lands are for the purpose of regulating future non-federal development, if any. Federal projects on excluded lands will be addressed by the federal consistency process as provided by the CZMA.

Big Sur Coast, Land Use Plan, Local Coastal Program, Monterey County, California 81 (approved April 10, 1986). This plan plainly departs from the Commerce Department's regulations and the Coastal Commission's prior representations that "all lands owned by the Federal government are excluded from the California coastal zone" (J.A. 106). It has not been submitted to the Department of Commerce for approval as an amendment to the California Coastal Zone Management program. See 16 U.S.C. 1455(g); 15 C.F.R. 923.80. The Coastal Commission's unilateral redefinition of the federal lands exclusion is inappropriate in light of the CZMA's requirement that state programs comply "with rules and regulations promulgated by the Secretary" (16 U.S.C. 1455(c)(1)). The CZMA cannot function effectively if the states, upon program approval, engage in creative reinterpretation of the CZMA's basic terms.

The scope of the federal lands exclusion has already been conclusively determined by the Commerce Department's unambiguous and authoritative regulatory construction, which the district court failed even to acknowledge. The Commerce Department has excluded, without qualification, all federally owned lands (15 C.F.R. 923.33), the CZMA requires California to comply with that regulation (16 U.S.C. 1455(c)(1)), and California has previously agreed that "all lands owned by the Federal government are excluded from the California Coastal zone" (J.A. 106). California must adhere to the Commerce Department's settled interpretation of the federal lands exclusion. In all events, California's competing interpretation is inconsistent with the language, legislative history, and purpose of Section 304(a).

Congress, in the exercise of its "complete power" over federal land use (see page 11, *supra*), may open federal lands to private mining, as it did in the Mining Act of 1872. That action, prescribing an allowable land use, does not curtail the federal government's "sole[] * * * discretion" (16 U.S.C. 1453(1)) over the lands in question. The government retains sole power to dictate the land's use. See *United States* v. *Coleman*, 390 U.S. 599, 602 (1968). ("Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes." (footnote omitted)). A person who acquires a mining claim receives certain rights of possession (30 U.S.C. 26), but neither he nor any other entity shares the government's discretion to prescribe how the land shall be used. The claimant is entitled to use the property only for the purposes specified by Congress, and he is divested of his rights if he fails to take necessary steps toward those ends. See 30 U.S.C. 28; 43 U.S.C. 1744(a); see generally 2 Rocky Mountain Mineral Law Foundation, *American Law of Mining* chs. 45-46 (2d ed. 1985). Thus, the plain language of Section 304(a) supports the conclusion that the federal lands exclusion remains applicable to lands subject to a mining claim.[13]

[13] Congress has authorized a variety of other possessory interests in federal lands, including oil and gas leases issued pursuant to the Mineral Leasing Act, 30 U.S.C. 181 *et seq.*, term permits for public recreation facilities in National Forests issued pursuant to 16 U.S.C. 497, and permanent rights of way across federal lands that are available under a variety of statutes. See, *e.g.*, *Ventura County* v. *Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), aff'd, 445 U.S. 947 (1980); *Union Oil Co.* v. *Morton*, 512 F.2d 743 (9th Cir. 1975) (oil and gas leases); *Wilson* v. *Block*, 708 F.2d 735, 756-760 (D.C. Cir. 1983) (recreation facility permit); *Wilderness Society* v. *Morton*, 479 F.2d 842, 853-854 (D.C. Cir. 1973) (pipeline right-of-way). Some of these possessory rights are property within the meaning of the Fifth Amendment. But in each case, the federal government retains title in fee to the underlying land, the right to restrict the grantee's use of the property to the limitations and purposes of the grant, and the right to manage the property for other purposes not inconsistent with the granted rights. See *United States* v. *Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1285 (9th Cir. 1980); see also *United States* v. *Gates of the Mountains Lakeshore Homes, Inc.*, 732 F.2d 1411 (9th Cir. 1984). In each case, the government retains sole discretion over ultimate land use.

The legislative history of Section 304(a) indicates that the federal lands exclusion extends, without qualification, to *all* federally-owned lands. As the OLC opinion notes (J.A. 94), "Nowhere is there any suggestion that Congress intended to exclude some federal land from the Coastal Zone, and hence from State regulation, while including other such land within the Zone." The legislative reports contain no suggestion that the federal lands exclusion dissipates if federally-owned lands are opened to non-federal development. They focus solely on whether the acreage in question is "Federal" or "non-Federal" land. Ses H.R. Conf. Rep. 92-1544, *supra*, at 12; S. Rep. 92-753, *supra*, at 9. See also 118 Cong. Rec. 35548 (1972) (the bill does not affect the "administration of Federal lands"). The congressional committees are, of course, familiar with federal lands terminology. They undoubtedly understood that federally-owned lands subject to mining claims are "federal" lands. See *United States* v. *Fickett*, 205 F. 134 (9th Cir. 1913); 1 Rocky Mountain Mineral Law Foundation, *American Law of Mining* § 3.02 (2d ed. 1985).

The purposes of Section 304(a) are best served by exclusion of all federally owned lands, whether or not subject to mining claims. As previously explained (pages

13-14, *supra*), the federal lands exclusion is intended to preserve the independence of federal land use management decisions. Federal management of public domain, multiple-use lands such as those held by the Forest Service and the Bureau of Land Management, is, in large part, a determination of where, and under what conditions, private members of the general public will be allowed to use those lands. These management decisions may result in limited property interests such as leaseholds, easements, or, as in this case, mining claims.[14] The creation of limited private rights in the use of public domain lands is a normal and expected result of federal management of those lands. If the creation of such private rights negated the CZMA's federal land exclusion and subjected the affected federal lands to state management and control, the independence of federal land management, as well as the need for any CZMA consistency review, would be effectively eliminated.[15]

Furthermore, the application of California's Coastal Act permitting requirements would, at best, simply duplicate other regulatory requirements. As the Coastal Commission repeatedly concedes (Br. 15, 38, 45), it cannot apply the Act to prohibit mining on federal lands; in-

[14] See note 13, *supra*. The federal management action may also result in permits or licenses to use federal property that do not rise to the status of property rights but are nevertheless subject to revocation by the federal government only if certain procedural guarantees are respected. See, *e.g.*, 5 U.S.C. 558(c); *Holland Livestock Ranch* v. *United States*, 655 F.2d 1002 (9th Cir. 1981). Cf. *United States* v. *Fuller*, 409 U.S. 488 (1973). Or the result may be the creation of contractual rights to take or harvest the resources of the public domain. See 16 U.S.C. 472a (permitting the sale of "trees, portions of trees, or forest products located on National Forest System lands").

[15] Congress has expressly recognized the national interest in encouraging mining activities. See Mining and Minerals Policy Act of 1970, 30 U.S.C. 21a; see also FLPMA, 43 U.S.C. 1701(a)(12); National Materials and Minerals Policy, Research, and Development Act, 30 U.S.C. 1601 *et seq.* Federal lands must be managed in light of the competing federal policies of mineral development and environmental protection. The federal government, rather than an individual state, should strike the balance between potentially conflicting national goals.

stead, it seeks to impose its permitting requirements as "an administrative vehicle for attaching non-prohibitory environmental conditions for mining" (*id.* at 38).[16] But the federal regulatory regime already protects state coastal management and environmental interests. In our view, the CZMA's consistency requirements apply fully to the Forest Service's approval of a mine operator's plan of operations affecting a land or water use of California's coastal zone. See 15 C.F.R. 930.51. California is free to invoke this congressionally authorized mechanism to protect its legitimate interests. The imposition of a separate state regulatory regime, with its attendant expenses and delays, would likely hamper the congressional goal of encouraging mining on federal lands.

Thus, we submit that the CZMA's federal lands exclusion applies with dispositive force in this case and precludes the California Coastal Commission from applying its coastal management permit requirements to mining activities conducted on federal lands.

[16] Although the Coastal Commission disclaims any intention to prohibit mining, it presumably would refuse to issue a permit—and thereby impose a mining prohibition—if Granite Rock failed to comply with its "non-prohibitory environmental conditions." Thus, the Commission would exercise what are, in effect, prohibitory powers. See *Hancock* v. *Train*, 426 U.S. 167, 180 (1976). Notably, it is far from clear that a coastal development permit is either needed or can function effectively as an "administrative vehicle." A coastal development permit is issued "[i]n addition to * * * any other permit required by law" (Coastal Act § 30600) and is issued only if "the proposed development is in conformity with the certified local coastal program" (§ 30604(b)). Hence, a coastal development permit has the singular purpose of assuring consistency with local coastal *land-use* plans and is unmistakably a land-use permit. The California courts have repeatedly stated that a coastal development permit is a land-use permit and that judicial review of the permitting decisions is pursuant to the state law standards for review of adjudicatory land-use decisions. See, *e.g.*, *Liberty* v. *California Coastal Comm'n*, 113 Cal. App. 3d 491, 498, 170 Cal. Rptr. 247, 251 (1980) (parking regulation); *Patterson* v. *Central Coast Regional Coastal Zone Conservation Comm'n*, 58 Cal. App. 3d 833, 130 Cal. Rptr. 169 (1976) (subdivision requirements). See also *Rea Enterprises* v. *California Coastal Zone Conservation Comm'n*, 52 Cal. App. 3d 596, 617-618 n.4, 125 Cal. Rptr. 201, 215-216 n.4 (1975) (Ashby, J., dissenting) (residential construction).

B. Even in the absence of the CZMA's federal lands exclusion, the California Coastal Commission could not apply its coastal management permitting requirements to federally authorized activities conducted on federal lands

The California Coastal Commission does not address the CZMA's federal lands exclusion. Instead, it characterizes the issue here as whether ordinary federal preemption principles require displacement of state "environmental regulation" (Br. i, 18). But this is not an ordinary preemption case. And the issue is not simply whether the state may impose pollution controls. The question here is whether *federally owned land* is subject to *local land use planning* (see note 16, *supra*). The Property Clause vests Congress with the power to determine appropriate uses of federal lands. Congress, exercising this plenary power, has enacted both comprehensive federal land use regimes and specific laws governing mining that provide mechanisms for federal-state consultation and coordination. Accordingly, even if the CZMA's federal lands exclusion and consistency review provisions were ignored, federal law would preclude direct application of local land use permitting requirements.

1. Congress, through the Property Clause, "exercises the powers both of a proprietor and of a legislature over the public domain." *Kleppe* v. *New Mexico*, 426 U.S. at 540. It has "power over the public lands 'to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them * * *.'" *Ibid.* (quoting *Utah Power & Light* v. *United States*, 243 U.S. at 405). This Court has "repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" *Kleppe*, 426 U.S. at 539 (quoting *San Francisco*, 310 U.S. at 29). The Property Clause "permit[s] 'an exercise of the complete power which Congress has over particular public property * * *.'" *Kleppe*, 426 U.S. at 540 (quoting *San Francisco*, 310 U.S. at 30).

The federal government's legislative and proprietary power over federal lands necessarily limits the states' au-

thority to regulate those lands.[17] This Court has not given precise definition to the preemptive qualities of the Property Clause. However, it is clear that federal lands are not "subject to the jurisdiction, powers and laws of the State in the same way and to the same extent as are similar lands of others." *Utah Power & Light Co.*, 243 U.S. at 404. State law "does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may acquire rights in them" (*ibid.*).[18]

It is not necessary in this case to determine whether the Property Clause, of its own force, precludes application of state land use regimes to federal lands. The Clause, "in broad terms, gives Congress the power to determine what are 'needful' rules 'respecting' the public lands." *Kleppe*, 426 U.S. at 539. Congress, in response, has enacted federal land management statutes (in addition to specific mining laws) that specify the state role

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[17] See, *e.g.*, *Hancock* v. *Train*, 426 U.S. 167, 179 (1976) ("where 'Congress does not affirmatively declare its instrumentalities or property subject to regulation,' 'the federal function must be left free'") (quoting *Mayo* v. *United States*, 319 U.S. 441, 447, 448 (1943) (footnote omitted)).

[18] The Property Clause plainly forbids the states from authorizing the use of unoccupied federal lands. "[T]he settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired." *Utah Power & Light Co.*, 243 U.S. at 404. The degree to which the Property Clause correspondingly limits the states' power to restrict the use of federal lands, however, has never been definitively settled. This Court suggested in *Omaechevarria* v. *Idaho*, 246 U.S. 343 (1918), that states may have power to restrict incidentally private uses of federal land where Congress has not spoken and the purpose of the regulation is otherwise within the legitimate powers of the state. It upheld an Idaho statute that prohibited grazing sheep on public lands that had been used for grazing cattle, emphasizing that the federal government had not actively managed the land, that the statute did not attempt to grant a right to use the lands, and that the state provision was "enacted primarily to prevent breaches of the peace." *Id.* at 352.

in the federal land use planning process. See Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*; National Forest Management Act of 1976 (NFMA) and Forest and Rangeland Renewable Resources Planning Act of 1974 (FRRRPA), 16 U.S.C. 1600 *et seq.* These statutes, like the CZMA (see pages 11-18, *supra*), demonstrate that the federal government, rather than the states, controls land use decision-making over the public domain.

The FLPMA establishes a federal land use management program for "public lands" (43 U.S.C. 1702(e)) within the jurisdiction of the Department of the Interior's Bureau of Land Management (BLM). Section 202(a) of the FLPMA authorizes the Secretary of the Interior to "develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands" (43 U.S.C. 1712(a)). It specifically directs the Secretary, in developing these plans, to coordinate federal planning and management activities with the programs of state and local government, to keep apprised of state and local plans and to provide meaningful involvement for state and local officials (43 U.S.C. 1712(c)(9)). Section 202 further provides (*ibid.*):

> Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

Thus, the FLPMA specifically defines the state's role in the authorized federal land use planning process. The federal government retains ultimate control over federal land, but the policies of local land use plans will be reflected in federal plans to the extent that it is consistent with federal objectives to do so.[19]

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[19] The legislative history of Section 202 demonstrates that Congress intended to *preserve* exclusive federal control over federal land use decisions. The Conference Report states (H.R. Rep. 94-1724, 94th Cong., 2d Sess. 58 (1976)):

> The conferees adopted a consolidation of the Senate and House provisions for coordination of BLM land use planning with Federal, State, local governments, and Indian tribes, with revisions making clear that the ultimate decision as to determining the extent of feasible consistency between BLM plans and such other plans rests with the Secretary of the Interior. This affirmed the need to maintain the integrity of governing Federal laws and Congressional policies.

See also H.R. Rep. 94-1163, 94th Cong., 2d Sess. 5, 7 (1976); S. Rep. 94-583, 94th Cong., 1st Sess. 45 (1975). FLPMA, by contrast, does require that federal land use plans *comply* with state "pollution control laws" (43 U.S.C. 1712(c)(8)). And FLPMA provides that federally granted rights-of-way shall "require *compliance* with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards" (43 U.S.C. 1765(a) (emphasis added)). Thus, when Congress wished to subject federal lands to state law, it made that intention manifest. Likewise the Department of Agriculture and the Department of the Interior both expressed their understanding that Section 202's coordination provisions were intended to provide coordination between federal land management plans on federal lands and state land management programs on *non-federal* lands. See S. Rep. 94-583, *supra*, at 100, 103. Finally, we note that Section 204 of FLPMA gives the Secretary of the Interior specific authority to withdraw lands from location under the mining laws. 43 U.S.C. 1714.

The National Forest System is subject to a similar federal land management scheme. At the time of the FLPMA's enactment, Congress, through the FRRRPA, had already established a comprehensive land use planning regime for these lands.[20] Congress therefore concluded that it was unnecessary to extend the FLPMA's land use planning provisions to National Forest System lands. See 122 Cong. Rec. 23448-23450 (1976). Congress, instead, supplemented and revised the FRRRPA through the NFMA.

The NFMA/FRRRPA regime, like the FLPMA scheme, provides a well-defined role for the states in federal land

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[20] See 16 U.S.C. 1604. Indeed, it provided a model for FLPMA's land use planning provisions. See H.R. Rep. 94-1163, *supra*, at 5. The FRRRPA, in turn, grew out of previous statutes providing for federal management of national forest lands. See, *e.g.*, Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 *et seq.* See also S. Rep. 93-686, 93d Cong., 2d Sess. 2-3 (1974). As the Department of Agriculture explained, "Land use and resource planning are, of course, integral to the management of the National Forest System and have long been a routine component of National Forest System administration" (*id.* at 27).

use planning. Section 6(a) directs the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies" (16 U.S.C. 1604(a)). Section 7 instructs the Secretary to share the information that he develops with the states so that they may "plan[] for the protection, use, and management of renewable resources on non-Federal land" (16 U.S.C. 1605). Thus, Congress again designed a comprehensive federal land use program that provides for federal-state cooperation. It again recognized the states' right to plan the use of non-Federal lands, but limited the states to an advisory role in federal land management decisions.[21]

Congress, through the FLPMA and the NFMA/FRRRPA regimes, and the federal land management agencies, through congressionally authorized regulations,[22] ver-

[21] The legislative history, repeatedly emphasizing the Forest Service's responsibility for comprehensive land management planning, fully supports this interpretation. See, *e.g.*, H.R. Rep. 94-1735, 94th Cong., 2d Sess. 19 (1976) (NFMA); H.R. Rep. 94-1478, 94th Cong., 2d Sess., Pt. 1, at 10 (1976) (NFMA); S. Rep. 94-893, 94th Cong., 2d Sess. 34-35 (1976) (NFMA); H.R. Rep. 93-1163, *supra*, at 2-3 (FRRRPA); S. Rep. 93-686, *supra*, at 5 (FRRRPA). Although the legislative history acknowledges the states' responsibility for land use planning on non-federal lands (*id.* at 13), it nowhere suggests that states would have land use planning authority over federal lands.

[22] Both the FLPMA and the NFMA vest substantial discretion in Executive Branch agencies to develop and refine federal land use policy. These agencies have given further clarification to the role of state law in federal land management programs. See 43 C.F.R. Pt. 1600 (BLM); 36 C.F.R. Pt. 219 (Forest Service). The land use planning process specifically considers whether particular lands are suitable for mining activities. See 43 C.F.R. 1610.7-1; 36 C.F.R. 219.22. The BLM and the Forest Service have also promulgated regulations governing specific operations—such as private mining—on federal lands. See, *e.g.*, 43 C.F.R. Pt. 3809 (BLM regulations governing surface management of mining activities on public lands); 36 C.F.R. Part 228 (Forest Service regulations governing national forest lands). These regulations, responsive to the congressional goal of federal-state cooperation, permit joint administration and enforcement of environmental requirements (see, *e.g.*,

ify what is implicit in the Property Clause—federal land management can justly be characterized as a field "in which the 'federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Hillsborough County* v. *Automated Medical Labs., Inc.*, No. 83-1925 (June 3, 1985), slip op. 5 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The use of federal lands is "'intimately blended and intertwined with responsibilities of the national government'" (*Hillsborough County*, slip op. 11 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 66 (1941)). The states' role is correspondingly limited. See *Utah Power & Light Co.*, 243 U.S. at 404-405.[23] The presence or absence of express congressional authorization of direct state land use control takes on special significance in this context. State land use requirements have no application to federal lands "save as they may have been adopted or made applicable by Congress" (*id.* at 405).

2. The Coastal Commission urges that the Mining Act of 1872 authorizes application of its land use permitting requirements. We disagree. The Act, designed to encourage mineral development,[24] is based on a fundamental premise that "[e]xcept as otherwise provided, all valuable mineral deposits in lands belonging to the United States * * * shall be free and open to exploration and purchase

43 C.F.R. 3809.3-1(c)) and frequently require that mining activities be conducted in compliance with state environmental standards (see, *e.g.*, 36 C.F.R. 228.8). They nevertheless preserve *federal control* over land use decisions on federal lands, "[c]oordinat[ing], *to the greatest extent possible*, with appropriate State agencies," mechanisms to protect affected lands (43 C.F.R. 3809.0-2(c) (emphasis added)).

[23] As Governor Babbitt has stated, "Federal lands in the West are generally not subject to any form of state management or administration. State planning and zoning laws stop dead at the federal fence." Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 Envtl. Law 847, 853 (1982).

[24] See *Creede & Cripple Creek Mining & Milling Co.* v. *Uinta Tunnel Mining and Transportation Co.*, 196 U.S. 337, 351 (1905); *Steel* v. *Smelting Co.*, 106 U.S. 447, 449-450 (1882). See also 30 U.S.C. 21a; 43 U.S.C. 1701(a)(12).

* * *" (30 U.S.C. 22). The Act adopts state law in three basic areas. First, Section 26 provides that state law, to the extent that it is consistent with federal law, governs a miners' "possessory title" (30 U.S.C. 26). Second, Section 51 provides that state law shall govern acquisition of water (30 U.S.C. 51). And third, Section 43 states that "[a]s a condition of sale, [state law] may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development, and those conditions shall be fully expressed in the patent" (30 U.S.C. 43). Plainly, Sections 26 and 51 do not implicate land use concerns.[25] We therefore turn our attention to Section 43.

Section 43 permits the states, in the absence of federal legislation, to impose necessary easements and other interests for the development of patented working mines in the district. See, *e.g.*, *Amador Queen Mining Co.* v. *Dewitt*, 73 Cal. 482 (1887). The western states generally implemented this legislation by "prescribing methods of obtaining easements and rights of way for mining purposes and providing for condemnation proceedings * * *." 1 C. Lindley, *Mines* § 252 (3d ed. 1914). See, *e.g.*, *Baillie* v. *Larson*, 138 F. 177 (D. Ida. 1905). Notably, Section 43 applies only to patented lands that have been severed from the public domain; thus, it does not expressly address the states' power to prescribe rules while the lands remain in federal ownership. But even if Section 43 permits

[25] Section 26 authorizes the states to prescribe various rules concerning the posting, content and recording of the location of mining claims, and the means of giving notice or recording of annual assessment work, as conditions for maintaining the individual miner's possessory title. See 1 C. Lindley, *Mines* § 250 (3d ed. 1914). This Court has found such supplemental state legislation valid and enforceable. *Butte City Water Co.* v. *Baker*, 196 U.S. 119, 125-126 (1905). Indeed, as this Court recognized in *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), federal law contained no recording requirements for mining claims prior to 1976; the recording systems were solely creatures of state law. Granite Rock has apparently complied with all state recording requirements. Likewise, it is undisputed that Section 51 requires Granite Rock to acquire water rights in accordance with state law. See *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604 (1978); see also 16 U.S.C. 481.

state regulation of mining *claims*, it has no application in this case.

The historical evidence indicates that Section 43 serves the limited purpose of permitting the state to burden one miner's operations for the purpose of allowing a neighboring miner fully to develop his mine. Typically, when one miner located a valuable lode discovery, other miners would soon locate adjacent claims. See, *e.g.*, *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U.S. 499, 502 (1901). Section 43 was apparently designed to permit state designation of easements regulating access to claims, transportation of ore, and adits for drainage, allowing each miner a full opportunity to develop his mine (see 182 U.S. at 509). Viewed in this light, Section 43 plainly does not authorize the Coastal Commission's proposed general land use regulation. Section 43 permits the states to regulate the competing interests of miners in the development of their respective mines; it does not authorize the states to conduct wholesale regulation of mining on federal lands as part of a regional or local land use management scheme.[26] Absent a clearer statement of congressional intent or an historical record of interpretation supporting general state land use power over mining claims, Section 43 cannot be read as a congressional adoption or incorporation of such authority.[27]

[26] The "hydraulic mining" cases cited by the Coastal Commission (Br. 23-24) do not support a different result. In those cases, the United States, private plaintiffs, and California sought to enjoin particularly destructive mining practices that resulted in pollution and obstruction of navigable waters. See *United States* v. *North Bloomfield Gravel Mining Co.*, 53 F. 625 (N.D. Cal. 1892); *Woodruff* v. *North Bloomfield Gravel Mining Co.*, 45 F. 129 (N.D. Cal. 1891); *Woodruff* v. *North Bloomfield Gravel Mining Co.*, 18 F. 753 (D. Cal. 1884); *People* v. *Gold Run Ditch & Mining Co.*, 66 Cal. 138 (1884). Those cases indicate that miners are subject to nuisance actions, at least to restrain deposit of debris (or pollutants) into a state's waters. But they do not support the application of local land use regulations to mining activities on federal lands. Indeed, hydraulic mining was ultimately subjected to *federal* regulation under the Caminetti Act, 33 U.S.C. 661 *et seq.* See *North Bloomfield Gravel Mining Co.* v. *United States*, 88 F. 664 (9th Cir. 1898).

[27] Accordingly, both federal and state courts have held that local governments cannot apply land use requirements to federal mineral

In short, the Mining Act of 1872 does not address conflicts between mining activities on federal lands and state land use planning. However, recent mining legislation does deal directly with this issue. Section 601 of the Surface Mining Control and Reclamation Act authorizes the Secretary of the Interior to review whether an area "may be unsuitable for mining operations" because of "an adverse impact on lands used primarily for residential or related purposes" (30 U.S.C. 1281(a) and (b)). The Governor of a state or "[a]ny person having an interest which is or may be adversely affected" may initiate the review process (30 U.S.C. 1281(c)). If the Secretary determines that the benefits resulting from a designation outweigh the benefits of mineral development, he may either withdraw the area from mineral entry or limit

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development activities. See, *e.g.*, *Ventura County* v. *Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), aff'd, 445 U.S. 947 (1980) (prohibiting application of a county's open space use permit requirements to oil and gas drilling on national forest lands); *Elliott* v. *Oregon International Mining Co.*, 654 P.2d 663 (Or. 1982) (prohibiting enforcement of county surface mining ordinances to reserved federal mineral interests); *Brubaker* v. *Board of County Commissioners*, 652 P.2d 1050, 1056 (Colo. 1982) (prohibiting denial of a special use permit for mining activities that were alleged to be "inconsistent with the long-range plan of the county and with existing surrounding uses"). The Coastal Commission contends (Br. 29-30) that state land use regulation is permissible provided that the state does not prohibit mining activities, noting that several state courts have allowed local regulation of mining claims on federal lands. But permitting requirements are inherently prohibitory—failure to comply with specific requirements will result in denial of the permit. See *Hancock*, 426 U.S. at 180. We submit that the proper distinction turns on the substance rather than the effect of state regulation. A state cannot determine the appropriate use of federal lands; however, it may impose certain valid, neutrally prescribed pollution control standards to mining activities. See, *e.g.*, 36 C.F.R. 228.8. Indeed, the cases permitting local regulation of mining of federal lands have typically involved pollution control regulations rather than land use requirements. See *State ex rel. Cox* v. *Hibbard*, 570 P.2d 1190 (Or. 1977) (dredge and fill permit); *State ex rel. Andrus* v. *Click*, 554 P.2d 969 (Idaho 1976) (dredge permit). See also *Mt. Emmons Mining Co.* v. *Town of Crested Butte*, 690 P.2d 231 (Colo. 1984).

mining operations (30 U.S.C. 1281(f)). Valid existing rights, however, are not to be affected (30 U.S.C. 1281(d)).

Thus, Congress has recognized that there may be conflicts between mineral development on federal lands and other activities on non-federal lands. Congress, in turn, has provided a federal solution. The creation of a federal process for resolving the conflict demonstrates that federal law, rather than state law, controls land use decisions affecting mining on federal lands. Furthermore, it demonstrates once again that Congress is sensitive to state interests in the use and management of the public domain.

3. A consistent theme runs throughout the law governing management of federal lands: the federal government has sole authority to determine the appropriate use of the public domain. Congress has provided that federal land managers shall consult and coordinate activities with the states. But the federal government ultimately controls federal land use decisions. There is simply no place for application of the Coastal Commission's land use planning requirements to activities occurring on federal property.

The Coastal Commission will be afforded substantial participation in any approval of a future plan of operations for Granite Rock's mining activities on Pico Blanco. The Forest Service has already agreed to prepare an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, prior to approving any new plan of operations that Granite Rock might submit. The Forest Service, in accordance with Council on Environmental Quality regulations that implement NEPA (40 C.F.R. 1503.1(a)(2)), will solicit comments from affected state agencies in the course of preparing such a statement. Additionally, the Forest Service's approval of a plan of operations is subject to the consistency requirements of Section 307 (c)(3)(A) of the CZMA to the extent that the plan affects a land or water use in the coastal zone. The State of California and the Coastal Commission thus have ample opportunity both to obtain information about, and

to control, the environmental consequences of Granite Rock's mining activities.[28]

In sum, Congress has ensured that state land use interests and concerns receive careful attention within the federal land management framework. But it has also retained the federal government's ultimate control over the use of the public domain. The California Coastal Commission has no authority to apply state land use permitting requirements to Granite Rock's mining activities occurring on federal lands.

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[28] The Coastal Commission concedes (Br. 38) that its coastal development permitting process cannot be applied to Granite Rock's activities in the manner in which the permit requirement is normally applied—to determine whether the proposed use of land is compatible with the coastal program. See, *e.g.*, *Bel Mar Estates* v. *California Coastal Comm'n*, 115 Cal. App. 3d 936, 171 Cal. Rptr. 773 (1981) (real estate development). It wishes to use the coastal development permit as an "administrative vehicle" (Br. 38) for imposing environmental (as opposed to land use) regulations. That permit would be both different in substance from the "coastal development permit" described in the Coastal Act and duplicative of the requirements of other authorities under state and federal law. See note 16, *supra*.

A party subject to the state coastal zone requirements must obtain a coastal development permit "[i]n addition to obtaining any other permit required by law * * *." Coastal Act § 30600(a) (1977). The County Air Pollution Control District can require a permit for, inter alia, operating equipment resulting in air emissions (Cal. Health & Safety Code §§ 40100, 42300 (West 1979)). The California Regional Water Quality Control Board may specify "discharge requirements" for addition of pollutants into surface waters, which are deemed equivalent to a permit under California law (Cal. Water Code §§ 13200, 13203, 13263(f), 13374 (West 1971 & Supp. 1986)). California law also requires registration prior to hauling hazardous waste (Cal. Health & Safety Code § 25163(a) (West 1977)). Finally, pursuant to the terms of a Memorandum of Understanding with the Forest Service, California may apply the reclamation features of its Surface Mining and Reclamation Act of 1975, Cal. Pub. Res. Code § 2710 *et seq.* (West 1984) to non-coal mining such as Granite Rock's limestone quarry. Thus, California law provides ample authority to issue appropriate permits.

CONCLUSION

The judgment of the court of appeals should be affirmed.[29]

Respectfully submitted.

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[29] See also note 6, *supra*.

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AMICUS CURIAE

BRIEF

(10)

Supreme Court, U.S.
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No. 85-1200

UNITED STATES SUPREME COURT

October Term, 1985

CALIFORNIA COASTAL COMMISSION, ET AL.,
Appellants,

v.

GRANITE ROCK COMPANY,
Appellee,

On appeal from the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE STATES OF ALASKA, ARIZONA, FLORIDA, HAWAII, IDAHO, LOUISIANA, MINNESOTA, MONTANA, NEVADA, NEW MEXICO, OREGON, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, AND WYOMING AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI, INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal raises important issues concerning the scope of state power to mitigate the effects of uses of federal lands. The states joining in this amicus brief have a keen interest in this matter, if for no other reason than federal lands comprise a substantial, even dominant, portion of the lands within their borders. See Public Land Statistics 1985 (Bureau of Land Management), Table 4, p. 5. As this Court has recognized, the activities taking place on these lands, comprising one-third of the national land base, often have profound influence on the economy and the overall quality of life in these states. See United States v. New Mexico, 438 U.S. 696, 699 (1978).

In this case the Court of Appeals for the Ninth Circuit held that a state law requiring the Granite Rock Company to secure a permit from the California Coast-

al Commission before engaging in mining in a coastal area of a national forest had been preempted by the federal Mining Law of 1872, 30 U.S.C. § 21, et seq., and by regulations adopted in 1974 by the United States Forest Service pursuant to the so-called 1897 Organic Act for national forest management, 16 U.S.C. § 551, 36 C.F.R. §§ 228.1-228.15. 768 F.2d 1077.

The dispute at the heart of this case is hardly run-of-the-mill. The Mining Law applies to several hundred million acres of federal land in numerous states. See Office of Technology Assessment, Management of Fuel and Nonfuel Minerals in Federal Land (1979), Appendix B, Table B-2, p. 337 (hereafter "OTA Report"). Currently, about two million mining claims exist on these lands, 90% of them in the Western states. See General Accounting Office, Interior Should Ensure against Abuses from Hardrock Mining (GAO-RECD-86-

48, March, 1986), p. 10. Nearly all the affected states have laws creating permit systems and establishing environmental protection standards that they apply to mining claims on federal lands. See generally OTA Report, pp. 250-60.

The land involved here is in a highly scenic area of the Big Sur coast, an important economic as well as natural resource to California and the nation. The state regulatory scheme at issue is, moreover, the kind of regulation of coastal land use encouraged by Congress in the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1464.[1/]

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1. This Court's recent decision in Secretary of the Interior v. California, 464 U.S. 312 (1984), is not implicated in this case. That decision concerned the special "consistency" provisions of the CZMA applicable to the federal oil and gas leasing process on the Outer Continental Shelf, and did not raise any issue of regulating of private activities on onshore federal lands under the CZMA, the Mining Law, or any other statute.

The decision below totally ignores the state-federal partnership in regulating mining activities on federal lands that predated adoption of the Mining Law by Congress in 1872, and that was ratified and carried forward by that law. It disregards numerous prior decisions of this Court and lower federal courts, dating back more than a century, confirming state power to regulate, tax, and even prohibit mining operations on federal lands in order to carry out state laws and policies. It conflicts with a number of recent decisions of the courts of three states, rendered in an identical context. It is inconsistent with the intent of Congress in giving the Forest Service regulatory authority over uses of the national forests, and with the Forest Service's intent in promulgating its regulations governing Mining Law activities. It runs directly counter not only to the letter of those

regulations, but to the agency's practice under them. Finally, it is insensitive to the recent teachings of this Court on pre-emption.

ARGUMENT

I. STATE ENVIRONMENTAL REGULATION BY MEANS OF A PERMIT REQUIREMENT IS FULLY CONSISTENT WITH THE HISTORICAL PARTNERSHIP BETWEEN THE STATE AND FEDERAL GOVERNMENTS IN REGULATING ACTIVITIES CONDUCTED ON FEDERAL LANDS UNDER THE MINING LAW OF 1872

If the term "cooperative federalism" had then been in vogue, the Mining Law of 1872, like the Reclamation Act of 1902, see California v. United States, 438 U.S. 645, 650 (1978), "would surely have qualified as a leading example of it." Id. That Congress would preserve a meaningful role for the states in the Mining Law is scarcely surprising, given the setting in which Congress acted.

When gold was discovered at Sutter's

mill in 1848, there was no federal mining law. See, generally, Swenson, Legal Aspects of Mineral Resources Exploitation, in Gates, History of Public Land Law Development (1968), pp. 708-723. Though the miners were technically trespassers on federal land, for nearly twenty years thereafter Congress left the miners and the states and territories completely free to regulate mining activities on federal land. Fittingly, California was the leader here, as it enacted and enforced several statutes governing mining activities on federal lands, see Swenson, p. 712, including some that sought to protect against environmental damage to other interests from mining. See Rocky Mountain Mineral Law Foundation, American Law of Mining (1st ed.), vol. 1, § 1.10, pp. 28-31. Even before the first federal legislation was enacted, this Court acknowledged and refused to interfere with state

regulation. See Sparrow v. Strong, 70 U.S. (3 Wall.) 97, 104 (1865); see also Jennison v. Kirk, 98 U.S. 453, 458 (1879).

The language of the Mining Law reveals Congress's ratification of pre-existing state regulation quite plainly. One section refers to (and assumes the legitimacy of) state laws in authorizing the miners themselves to regulate claim location and possession. 30 U.S.C. § 28.[2/] Another section refers to "regulations prescribed by law," which was soon thereafter construed to embrace state laws adding new requirements beyond those in federal law. See O'Donnell v. Glenn, 8 Mont. 248, 19 P. 302, 306 (1888). Another section authorizes the states to "provide

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2. Though this section was a rather backhanded way of acknowledging the propriety of state regulation, this Court had no difficulty discerning Congress' intent. See Butte City Water Co. v. Baker, 196 U.S. 119, 123 (1905) ("clear recognition" of state power).

rules for working mines, involving easements, drainage, and other necessary means to their complete development." 30 U.S.C. § 43.[3] Still another section defers to state water law for mining and other purposes. 30 U.S.C. § 51. While this last provision has become justly famous as es-

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3. Although this section directs such conditions to be "fully expressed in the patent" authorized to be issued by the Mining Law, the courts have never read it as restricting state regulation of unpatented claims. See Lindley, Mines (3d ed. 1914), § 252, pp. 565-571. In enacting the Mining Law, Congress assumed that mining claims reflecting discovery of valuable mineral deposits would promptly be patented into private ownership. But Congress neglected to require patenting, and thus it came be be recognized that valid unpatented mining claims were recognized ownership interests, and that the patent, as this Court put it in Chambers v. Harrington, 111 U.S. 350, 353 (1884), "adds little to the security of the party in continuous possession of a mine he has discovered or bought." The fact that practice under the statute came to depart substantially from Congress's original vision was never held to defeat the state regulatory power Congress had sought to preserve.

tablishing a tradition of federal deference to state water law, see California v. United States, 438 U.S. 645, 656-57 (1978), it should be observed that it was then a relatively obscure and unexceptional part of a general statute shot through with deference to state authority.

The legislative history of the 1866 Mining Act (eventually subsumed into the Mining Law of 1872) fully bears out this congressional deference to local regulation. See, e.g., Cong. Globe, 39th Cong., 1st Sess. (1866), pp. 3141, 4054 (Rep. Higby); 3226-3227, 3234 (Sen. Stewart); p. 3235 (Sen. Conness); pp. 4021, 4053 (Rep. Ashley). Opposition arguments that preserving state and local regulatory authority would be confusing and inefficient, see id. pp. 3232-33, 3453 (Sen. Williams); pp. 4049-50 (Rep. Julian), were soundly

rejected. See, e.g., id., p. 3453.[4/]

This history is particularly important, given this Court's often-repeated admonition that the starting point for construing federal legislation "in a field which the states have traditionally occupied" is to presume that "the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

This Court has also cautioned that the preemptive inquiry is into "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977). Here, the actual practice has fully embod-

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4. This opposition argument was renewed in 1870, but met a similar fate. See, e.g., Cong. Globe, 41st Cong. 2d Sess. (1870), p. 2029 (Rep. Julian).

ied Congress' desire not to displace the states' preexisting exercise of regulatory power. The Western states have collectively enacted hundreds of statutes over the years concerning location, maintenance and operations upon unpatented mining claims such as are involved in this case. See Rocky Mountain Law Institute, American Law of Mining (1st ed.), vol. 1, §§ 5.46-5.80, pp. 823-894. Similarly, state and federal courts, including this Court, have collectively rendered hundreds of decisions over the years enforcing these state laws, and voiding federal mining claims that were out of compliance with them. In general, this Court has never questioned the "authority of the mining states to regulate the possession of the public lands in the interests of peace and good order." Union Oil Co. v. Smith, 249 U.S. 337, 348 (1919). See also Jennison v. Kirk, 98 U.S. 453, 462, note 1 (1879);

Butte City Water Co. v. Baker, 196 U.S. 119, 123-128 (1905) (collecting cases).

Congress's deference to state law was not utterly without limit, for states could not patently contradict a specific, unambiguous requirement of federal law. See, e.g., Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co., 167 U.S. 108, 114-115 (1897). But numerous state laws that were more stringent than federal law, or that placed additional obligations on miners that were not expressly acknowledged in federal law, were routinely upheld. See, e.g., Erhardt v. Boaro, 113 U.S. 527, 536 (1885); Kendall v. San Juan Mining Co., 144 U.S. 658, 664-665 (1892). See also Parley's Park Mining Co. v. Kerr, 130 U.S. 256, 261 (1889) (dictum). For an example from the Ninth Circuit, ignored by the court below, see Northmore v. Simmons, 97 F. 386, 387-388 (9th Cir. 1899).

The substantial deference Congress

accorded to non-federal regulations in the Mining Law was not without practical problems, for it allowed each state to vary the requirements for securing and maintaining rights to mine on federal lands. But Congress has never been troubled by this absence of uniformity. Indeed, as early as 1880, Congress was asked to preempt state laws and substitute a uniform national system. The report of the first federal Public Land Commission, issued in 1880, suggested that local regulation had worked badly and recommended federal preemption. The recommendation was not acted upon. See Gates, History of Public Land Law Development, pp. 422-423, especially at 429. Nearly a century later, the Public Land Law Review Commission recommended federal preemption of certain state laws regulating Mining Law activities, see One Third of the Nation's Land, pp. 129-30 (1970), but once again Congress balked.

Instead, in requiring federal recordation of all mining claims for the first time in 1976, see United States v. Locke, 471 U.S. ___, 105 S.Ct. 1785 (1985), Congress was careful not to displace any requirements of state law. See 43 U.S.C. § 1744(d); S.Rep. No. 583, 94th Cong., 1st Sess. 65 (1975); see also 43 C.F.R. § 3833.0-1(d) (1985). Thus, the unbroken theme in federal mineral legislation over the years has been that considerations of federalism and sensitivity to state interests outweigh considerations of efficiency, uniformity and the promotion of mineral development.

It is worth recalling that the Mining Law created an additional mechanism for accommodating activities conducted by private persons on federal lands to local conditions, needs, and policies. This was, of course, the miners' own regulations. See 30 U.S.C. §§ 22, 23, 26, 28.

These miners' rules have largely disappeared, being replaced by state laws fulfilling the same objective. The leading commentator on the Mining Law more than 70 years ago observed that the miners' rules "are gradually becoming superseded by [state] statutory enactments, which, of course, are but another form of expressing local rules." Lindley, Mines (3d ed. 1914), § 46, p. 33. It has not been open to serious dispute that, as Judge Lindley put it, state laws "form an integral part" of the system of mining regulation on federal lands. Id.

Under that system, as Dean Costigan observed in 1908, "a very great latitude is left to the states" in devising regulations supplementing federal law. Handbook on American Mining Law, § 4, p. 21. This Court decided very early on, for example, that the state authority preserved by the Mining Law encompassed the substantial

power to tax a claimant's possessory interest in an unpatented mining claim. Forbes v. Gracey, 94 U.S. 762 (1877). Firmly rejecting a preemption argument, this Court went on to allow the state to secure collection of the tax by enforcing a lien on the claim. See 94 U.S. at 763, 767. See also Elder v. Wood, 208 U.S. 226 (1908).

This Court's unanimous recognition of the state's power to tax unpatented mining claims came despite the fact that the Mining Law says nothing specific about taxation, and is persuasive evidence that the statute's silence regarding environmental regulation should not be construed to cut against state authority.

The taxation cases also confirm that the states' authority does not turn on whether the mining claims in question are patented or not. Indeed, in Forbes v. Gracey this Court was quite contemptuous

of the notion that a claimant's refusal to obtain patent should somehow shield it from state taxation. See 97 U.S. at 767. The record here shows that Granite Rock believes it has "valid" mining claims of "tremendous value," Jt.App. pp. 71-72, which suggests that it is reluctant to seek patent on its claims because of its desire to avoid state regulation. This Court gave such evasion of state authority short shrift in Forbes v. Gracey; it deserves equal treatment here.[5]

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5. Indeed, the Granite Rock Company owns fee land just outside the national forest, as well as holding mining claims just inside the forest boundary. Its mining of limestone is being conducted only on the federal mining claims. See Jt.App. 31-32, 39, 44. Had it chosen to mine its fee property a few feet away, or had it obtained fee title to its claims under the Mining Law by paying a few dollars per acre, see 30 U.S.C. §§ 29, 37, it would have been fully subject to state Coastal Commission regulation, including the permit requirement of the California Coastal Act. See, e.g., Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 377 (1977).

State regulation aimed at mitigating the environmental effects of mining on federal land has a long history. The earliest cases arose in California, in fact, and involved a controversy of dramatic proportions between the hardrock mining industry and farmers over the practice of hydraulic mining. In a series of cases in state and federal courts in the 1870's and 1880's, hydraulic mining was substantially prohibited through application of common law nuisance principles. See, generally, Kelley, Gold vs. Grain (1959). Though the opinions in these cases did not clearly indicate whether the mining claims involved were patented or unpatented, both state and federal courts addressed the question whether hydraulic mining was somehow insulated from state regulation by congressional preemption or legislative acquiescence, and both concluded it was not. See People v. Gold Run Ditch & Min-

ing Co., 66 Cal. 138, 151-52, 4 P. 1152 (1884); Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753, 772-775 (C.C.A. 1884). Cf. Gold Washing & Water Co. v. Keyes, 96 U.S. 199 (1878). Judge Lindley described the hydraulic mining cases as establishing the principle that a mining practice creating a nuisance "has neither been authorized by . . . national legislation nor legalized by implication." Lindley, Mines (3d ed., 1914), vol. 3, § 849, p. 2098.[6]

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6. The fact that state regulation was expressed there through the common law of nuisance rather than through a more comprehensive regulatory scheme such as that employed by the Coastal Commission is irrelevant to the preemption issue. Appellant's basic challenge is to the authority of the state to regulate, not the form by which the regulation is expressed or enforced. If a state can apply its common law to close down a mine or require it to pay for the damages it causes, surely it can apply a statutory scheme aimed at preventing those damages from occurring in the first place.

Numerous other cases in state and fed-

In the modern era, with the hardening of public sentiment in favor of environmental protection, many states have begun more systematically to regulate mining operations on federal lands, and state permitting requirements virtually identical to those at issue here have been upheld against preemption challenges. State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976) (Click I); 102 Idaho 443, 631 P.2d 614 (1981) (Click II), cert. denied sub nom. Click v. Idaho, 457 U.S. 1116 (1982); State ex rel. Cox v. Hibbard, 31 Or.App. 269, 570 P.2d 1190 (1977); Mt. Emmons Mining Co. v. Town of Crested Butte,

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6 (Cont'd).

> eral courts have applied common law principles to control environmental damage from operations initiated under the Mining Law. As Lindley points out, the early customs of the western miners, on which the federal Mining Law was based, never sanctioned serious interference with another's interests. Lindley, Mines (3d ed. 1914), vol. 3, § 843, pp. 2085-2086 (collecting and reviewing the cases).

690 P.2d 231 (Colo. 1984). Although two other decisions held that a flat state prohibition of all activity on federal mining claims was preempted, Elliott v. Oregon International Mining Co., 60 Or.App. 474, 654 P.2d 663 (1982); Brubaker v. Board of County Commissioners of El Paso County, 652 P.2d 1050 (Colo. 1982); (and see Skaw v. United States, 740 F.2d 932, 940-41, n. 3 (Fed.Cir. 1984)), in other cases (Mt. Emmons, Hibbard) these same courts upheld state authority to use a permit system to regulate such activities to protect the environment.

Moreover, neither Elliott nor Brubaker expressed any doubt about the fact that the state has environmental regulatory authority over activities on unpatented federal mining claims. See 654 P.2d at 667-68 (Elliott) and 652 P.2d at 1059 (Brubaker). It has been uniformly accepted, in other words, that the states are in

partnership with the federal government in insuring that mining activities on federal land are conducted with due regard for protection of the environment.[7]

Brubaker and Elliott held that a state cannot flatly deny permission to engage in activity on unpatented mining claims, finding that authority preempted by the Mining Law, and particularly the "free and open" language of 30 U.S.C. § 22. See, e.g., 652 P.2d at 1055-56. We are not so convinced. The "free and open" language is expressly qualified by reference in the same section to local customs

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7. It is worth noting that, unlike appellant here, most of the hardrock mining industry has generally accommodated itself to state regulation. See, e.g., Friends of the Earth v. Butz, 406 F.Supp. 742, 747 (D.Mont. 1975), appeal dismissed as moot, 576 F.2d 1377 (9th Cir. 1978); Watson and Danielson, Environmental Mediation, 15 Nat. Resources Lawyer 687, 692, n. 11 (1983); Kimball, Impact of BLM Surface Management Regulations on Exploration and Mining Operations, 28 Rocky Mt. Min. L. Inst. 509, 562-65 (1983).

and regulations, and non-federal entities have consistently been allowed to impose requirements on claimants on federal land more burdensome than those contained in the Mining Law itself, even where the effect is to invalidate claims.

Moreover, the claimant's possessory right in the mining claim is "property in the fullest sense of that term; . . . taxable by the state [and] for all practical purposes of ownership . . . as good as though secured by patent." Wilbur v. United States ex rel. Krushnic, 280 U.S. 306, 316-317 (1930). As Congress's Office of Technology Assessment put it in a recent report:

> In sum, the private property interest of a mining claimant under the Mining Law is subject to the full exercise of the States' police power. The Mining Law was intended as a codification and preservation of State regulation of the location and use of mining claims. Indeed the States are given substantial power over the actual process of acquisition of private rights under the Mining Law. Al-

> though a State cannot burden the acquisition process with unreasonable requirements or requirements inconsistent with Federal law, it may specify the details of the acquisition process and then fully regulate the resulting private property interest.

Management of Fuel and Nonfuel Minerals in Federal Land (1979), p. 252.

In any event, the regulatory/prohibitory distinction offered in decisions like Brubaker simply does not work. The rights of a Mining Law claimant are qualified by the need to show discovery of an economically viable deposit. See United States v. Coleman, 390 U.S. 599 (1968). But if state (or federal) regulation increases the cost of conducting mining activities on federal claims sufficiently, the deposit may be rendered uneconomic to mine.

This possibility has not troubled this Court in the past. California could tax Granite Rock's interest in its claims,

see Forbes v. Gracey, 94 U.S. 762 (1877), yet that case acknowledged no limit on the state's taxing power. Moreover, to say that the state (or the federal government, for that matter) may regulate only to the extent it does not effectively prohibit mining leads to an odd result. It would tend to allow regulation only of clearly profitable mining operations, and not marginal ones, by limiting the extensiveness of the regulation depending upon the economic viability of the particular operation. Nothing in the Mining Law, its legislative history, or its administration suggests that this was Congress's intent.

Indeed, the federal government routinely takes into account the cost of compliance with state environmental regulatory requirements in determining whether a valuable mineral deposit has been discovered within the meaning of the Mining Law. See, e.g., United States v. Kosanke Sand

Corp., 80 I.D. 538, 546 (1973); United States v. Pittsburgh-Pacific Co., 84 I.D. 282, 290-91 (1977). See also Affidavit of Roger W. Jeppson, submitted on behalf of Granite Rock, which acknowledges that the discovery inquiry includes consideration of, among other things, "the costs to be incurred in compliance with all federal, state and local environmental regulations." Jt. App., p. 98.[8/]

The federal government's recognition that the cost of complying with state environmental regulations influences the discovery determination means that this regu-

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8. The federal government has adopted the same practice in deciding the closely analogous question, under the Mineral Leasing Act, of whether "commercial quantities" of coal or "valuable deposits" of phosphate have been discovered by holders of prospecting permits for these minerals. See 30 U.S.C. § 201(b) (1976) (prospectively repealed by Statutes at Large, vol. 90, p. 1083 (1976) (coal); 30 U.S.C. § 211(b) (phosphate)). See, e.g., 43 C.F.R. § 3430.1-2(b) (1985) (coal).

lation may be a factor in rendering a claim invalid. Yet, if the environmentally protective conditions are not arbitrary, the mere fact that they add costs, even costs sufficient to render a claim invalid, is not in itself a reason for finding that the regulatory power does not exist.

But there is no need to plumb the furthest reaches of state regulatory power in this case. The appellant here has refused to apply for a permit from the Coastal Commission, so the Commission has not yet had an opportunity to exercise its judgment whether, and to what extent, further protections are necessary to preserve California's interest in its coastal and related resources. In any event, appellant Coastal Commission has stated on the record that it has no intention of denying Granite Rock a permit. See Brief for Appellants, pp. 61, 63.

In sum, state regulation, including

environmental regulation, has always been an accepted part of the administration of the Mining Law. The Court of Appeals turned its back on this fact, curtly dismissing it as "unpersuasive," 768 F.2d at 1083, in astonishing disregard of the rich history of state involvement in regulating activities conducted under the Mining Law. To view, as did the court below, state power to regulate private activities on federal lands as analogous to state power to regulate practices of the United States Patent Office is strikingly myopic. See 768 F.2d at 1082, discussing Sperry v. Florida, 373 U.S. 379 (1963).

II. STATE REGULATORY AUTHORITY IS FULLY PRESERVED IN THE STATUTES AND REGULATIONS APPLICABLE TO NATIONAL FORESTS

When Congress first set out the management guidelines for the national forests in 1897, it made such lands subject

to the Mining Law, 16 U.S.C. § 478, including the preexisting state regulatory power embraced within it. To eliminate any possible doubt, Congress included an explicit disclaimer in the 1897 Act:

> Jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence . . . the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof . . . be absolved from their duties as citizens of the State.

16 U.S.C. § 480.[9] This has been construed by this Court in accordance with its plain meaning. See Wilson v. Cook, 327 U.S. 474, 486-487 (1946); United States v. County of Fresno, 429 U.S. 452, 455 (1977). Thus, nothing in the laws ap-

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9. To the same general effect are 16 U.S.C. § 530, adopted as part of the Multiple Use-Sustained Yield Act of 1960, and 16 U.S.C. § 551(a), adopted in 1971. See 1971 U.S. Code Cong. & Admin. News at 1378.

plicable to national forests shows any intent to displace or preempt otherwise applicable state laws.

Although the court of appeals found that the Forest Service's adoption of environmental regulations in 1974 operated to preempt California's permit requirement, see 768 F.2d at 1081, 1083, this Court has generally required federal agencies to manifest a specific intent to preempt state law. Hillsborough County v. Automated Medical Laboratories, __ U.S. ___, 105 S.Ct. 2371, 2377 (1985). The record here is bereft of any such intent--the regulations themselves and the agency's actual practice under them are decidedly to the contrary.

The regulations explicitly refer to the applicability of state laws, without distinguishing betweeen those laws that are implemented by permits and those that are not. See, e.g., 36 C.F.R. §§ 228.8(a),

(b), (c) and (h); 228.9; 228.11 (1985). Most notably, 36 C.F.R. § 228.8(h) provides that "[c]ertification or other approval by state agencies . . . of compliance with laws and regulations relating to mining operations will be accepted as compliance with similar or parallel requirements of these regulations."[10/]

The agency's intent could not be more clear: It not only acknowledges the propriety of state regulation by permit ("certification or other approval"), but actually defers to it, at least to the extent it is "similar or parallel" to feder-

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10. The environmental impact statement (EIS) prepared by the Forest Service on these regulations is particularly revealing. It recounted that state agencies had expressed "concern" about possible "overlap and duplication of the proposed regulations with existing State law," and flatly stated that the duplication was "recognized and provided for" in the regulations, citing what is now 36 C.F.R. § 228.8(h). Final EIS No. 74-3204F, Proposed Mining Regulations (U.S. Forest Service, July 12, 1974), pp.21-22.

al requirements. Indeed, the Forest Service has entered into formal cooperative agreements with numerous state and local regulatory agencies to carry out this partnership. See Appendices I-O to the Jurisdictional Statement of the California Coastal Commission.

It is therefore scarcely surprising that the Forest Service's environmental assessment and its approval of appellee's plan of operations both counseled that Granite Rock is responsible for obtaining necessary approvals under state law. See Jt. App. pp. 36, 46, 54. The court of appeals discounted the relevance of these agency representations by characterizing them as "routine staff statement[s]" that "cannot change the effect of formally adopted regulations." 768 F.2d at 1083. But the court's view of these regulations was in profound disregard of their language, spirit, and implementation, as well

as the statutory authority under which they were adopted--each of which negates the conclusion that the state permit requirement has been preempted. Surely, much more than appears here on the agency's intent to preempt is necessary to displace a longstanding state regulatory presence. Compare, e.g., Capital Cities Cable v. Crisp, 467 U.S. 691, 701 (1984), with Head v. New Mexico Board of Examiners, 374 U.S. 424, 432 (1963).

Finally, it bears emphasizing that the Forest Service's regulations cannot be presumed sufficient to protect the state's legitimate regulatory interests here. Forest Service implementation of its regulatory authority has been repeatedly criticized as too conciliatory to mining claimants and not protective enough of the non-mineral resources involved. See, e.g., Office of Technology Assessment, Management of Fuel and Nonfuel Mineral Resources

in Federal Land (1979), pp. 193-196; Council on Environmental Quality, Hard Rock Mining on the Public Land (1977), pp. 16-19; National Academy of Sciences/National Research Council, Surface Mining of Non-Coal Minerals, A Study of Mineral Mining from the Perspective of the Surface Mining Control and Reclamation Act of 1977 (1979), pp. 175-176.

III. THE DECISIONS IN FIRST IOWA AND VENTURA COUNTY DO NOT CONTROL THIS CASE

The court below also relied on two decisions where state permitting requirements have been found preempted. The first was this Court's decision in First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946), construing the Federal Power Act, 16 U.S.C. §§ 791a-825r. First Iowa emphasized the statute's comprehensive federal planning responsibility for such power projects, a

responsibility that it held did not admit a state veto. The Power Act and the Mining Law could not be more different on this score, for the latter calls for no federal planning at all.[11] Rather, it simply throws open federal lands to the location and development of mining claims, and makes them subject to both federal and state regulation. Further, the reach of First Iowa has been sharply confined in the public lands context by subsequent decisions like California v. United States, 438 U.S. 645 (1978). And see N.Y. Dep't of Social Services v. Dublino, 413 U.S. 405, 415 (1973).

The other decision relied on heavily

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11. Significantly, the modern statute that establishes a comprehensive planning system for national forest lands, 16 U.S.C. § 1604, adopted in 1974, requires those plans to be "coordinated with the land and resource management planning processes of State . . . governments." See also 36 C.F.R. § 219.7 (1985).

by the court below was Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), aff'd mem., 445 U.S. 947 (1980). In contrast to the court of appeals, the district court here distinguished Ventura because the Coastal Commission here does not seek to prohibit, but merely regulate, appellant's mining activities, whereas in Ventura the County sought, in essence, to prohibit the federal oil and gas lessee's operations. See 590 F.Supp. 1361 at 1372-73.[12] We believe this is just one of

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12. Other courts recently facing issues similar to Ventura have either ignored it or distinguished it for the same reason. See, e.g., Gulf Oil Corp. v. Wyoming Oil and Gas Conservation Commission, 693 P.2d 227, 236-38 (Wyo. 1985); Hibbard, supra, 570 P.2d at 1195; Crested Butte, supra, 690 P.2d 231, 241-42; Click II, supra, 631 P.2d 614, 617-8.

In Ventura, the County's principal argument, asserted "extensively," was that Congress could not constitutionally preempt state authority over federal lands. See 601 F.2d 1083. That contention, the rejection of which was virtually mandated by this

several grounds for regarding Ventura as not controlling this case.

First, the Forest Service regulations here expressly acknowledge state regulatory authority, a fact not present, or at least not mentioned, in Ventura. This agency administration and interpretation of the applicable law is entitled to considerable deference. See, e.g., Chevron USA v. Natural Resources Defense Council, 467 U.S. 837, 844-845 (1984).

Second, in Ventura the Ninth Circuit construed Ventura County's regulatory

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12 (Cont'd).

Court's unanimous decision in Kleppe v. New Mexico, 426 U.S. 529 (1976), undoubtedly influenced the court's perspective on the County's fall-back argument that Congress had not actually preempted the County's authority in the Mineral Leasing Act, because the County's position reflected an intransigent, confrontational attitude hostile to the mining operation there in question. No such hostility pervades this record, and neither the appellant nor the amici states seek to relitigate the constitutional issues decided in Kleppe.

scheme as allowing the County uncabined local discretion to deny permission to mine on federal lands. See 601 F.2d at 1084. Here, on the other hand, as the district court noted, the Coastal Commission's authority is more confined. See 590 F.Supp. at 1373.

Third, and perhaps most important, we believe that Ventura has been sharply limited, if not implicitly overruled, by subsequent decisions of this Court. Specifically, the decision in Commonwealth Edison v. Montana, 453 U.S. 609 (1981), involving precisely the same statute and the same statutory language, seriously undermines Ventura's precedental value.[13]

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13. The opinion in Commonwealth Edison made not a single reference to Ventura, even though this Court had summarily affirmed the court of appeals' decision only a year earlier. Because Commonwealth Edison is both more recent and involved plenary consideration rather than summary disposition, it is considerably more authoritative than Ventura.

Unlike Ventura, Commonwealth found nothing in the Mineral Leasing Act or its legislative history implicitly exempting federal lessees from the exercise of state authority. Compare 601 F.2d at 1086 with 453 U.S. at 631, 632.[14/]

Significantly, Commonwealth Edison's view of state authority over private mining operations on federal lands was essentially identical to Forbes v. Gracey, supra. Indeed, Forbes had to be a more difficult case because, while the Mineral

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14. The fact that the present case involves the Mining Law rather than the Mineral Leasing Act is another possible ground for distinguishing Ventura. But it is useful to recall that prior to adoption of the Mineral Leasing Act, oil and gas development on federal lands was governed by the Mining Law. See Swenson, Legal Aspects of Mineral Resources Exploitation, pp. 730-745; Union Oil v. Smith, 249 U.S. 337 (1919). Thus, the Mineral Leasing Act saw Congress legislating in a context suffused with a tradition of state regulatory authority. Appreciation of this setting was not apparent in the Ventura decision.

Leasing Act refers to the power to tax as a power the state "may have," see 30 U.S.C. § 189, the Mining Law is resoundingly silent on the subject. Yet this Court in Forbes had little difficulty finding this state power sheltered by the Mining Law.

No distinction readily suggests itself between the power to tax and the power to regulate. In both cases the state acts to protect and advance legitimate state interests. In fact, taxation tends to be more burdensome than environmental regulation. Taxation always increases an operator's costs, while environmental regulation may not necessarily do so, because good environmental practices can lead to efficiencies that reduce an operator's costs over the longer term.

Thus, Commonwealth Edison should be read as modifying, or even overruling, Ventura. Other more recent decisions of

this Court also reflect an attitude toward preemption sharply different from that found in Ventura. See, e.g., Pacific Gas & Electric v. State Energy Commission, 461 U.S. 190 (1983); Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984). And see Note, State and Local Control over Energy Development on Federal Lands, 32 Stan.L.Rev. 373, 377-78 (1980).

Finally, even though the federal lessee in Ventura had not yet applied for a county permit, the court of appeals inferred that the County's aim was to veto the activity. See 601 F.2d at 1084-85. But as the district court here recognized, see 590 F.Supp. at 1373, this Court has since emphasized that facial challenges to regulatory power, such as appellant is making here, must be measured facially, and cannot be controlled by speculations about how that power might, in the end, actually be exercised. See, e.g., Agins v.

City of Tiburon, 447 U.S. 255, 260 (1980).[15]

IV. ANY FEDERAL POLICY FAVORING MINING DOES NOT PREEMPT STATE LAW

The court of appeals placed heavy reliance on the so-called "promotion of mining" purpose of the Mining Law. See 768 F.2d at 1081. It paid lip service to this Court's recent holdings that a "general federal purpose to encourage a particular activity does not automatically preempt state environmental regulation that incidentally discourages that activ-

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15. Another possible distinction is that Ventura involved local government, while this case involves state government. Although Congress may distinguish state and local governments if it chooses, we frankly do not see that Congress has drawn such a distinction in the Mining Law, at least in plain terms. Because local governments are, for federal purposes, usually regarded as political subdivisions of state government, we believe that, unless Congress has plainly drawn a different line in a statute, local governments would share state regulatory authority to whatever extent the state deemed appropriate.

ity." Id. Nevertheless, it went on to find state regulation "preempted simply because it would undermine the federal permit authority." 768 F.2d at 1082.

This reasoning was flatly rejected by this Court in Commonwealth Edison, a case decided under the Mineral Leasing Act, which not incidentally contains "promotion of mining" language almost identical to that found in the Mining Law.[16] There this Court found no preemption, even assuming that the state taxation undermined the federal policy of capturing all the economic rents attributable to mining coal on federal lands. See 453 U.S. at 631-33. And this Court has provided other forceful reminders in recent years that

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16. Compare 17 Stat. 91 (Mining Law of 1872, entitled "An Act to Promote the Development of the Mining Resources of the United States") with 41 Stat. 437 (Mineral Leasing Act of 1920, entitled "An Act to Promote the Mining of Coal, Phosphate, Oil, Oil Shale, Gas and Sodium on the Public Domain").

the general thrust of federal policy is no basis for finding otherwise applicable state laws preempted. See, e.g., Pacific Gas & Electric Co. v. State Energy Commission, 461 U.S. 190, 221-23 (1983).

Moreover, the court below failed to examine closely enough the federal policy promoting mining. The 1872 Mining Law was not designed to promote mining at all costs. Congress knew then, as it knows now, how to thwart state regulation that constrains mining activity. Its failure to include preemptive language, and indeed its positive encouragement and incorporation of state regulation into the federal scheme, demonstrate beyond peradventure that its policy was indeed to promote the development of federal mineral resources, but only where consistent with state regulatory policies, tailored to local conditions, that do not contradict the plain letter of the Mining Law. The very fact

that Congress built a partnership with states into that law thus tempers, at its very source, the federal policy favoring mining.

The court below also found support for preemption in Congress's alleged reaffirmation of that policy in the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a, although it recognized that this act was also concerned with environmental protection. See 768 F.2d at 1081. But neither this nor any other congressional expression of concern in recent years about domestic supplies of strategic minerals (of which limestone is assuredly not one) has purported to change existing law or alter the federal-state regulatory balance. See, e.g., H. Rep. No. 91-1442, 91st Cong., 2d Sess. 5 (1970); 30 U.S.C. §§ 1601-1605; S. Rep. No. 96-897, 96th Cong., 2d Sess. 15 (1980). Whatever weight such vague, hortatory statutory

policies might add to the preemption side of the scales is fully offset by other expressions of congressional policy, such as that found in the Enviromental Quality Improvement Act of 1970, which assigns state and local governments "primary responsibility" for implementing the national policy to enhance environmental quality. See 42 U.S.C. § 4371(b)(2).

Finally, to the extent the federal policy promoting mining has any significance for the executive branch, it applies most directly to the Department of the Interior because, under the 1905 statute transferring management authority over the national forests to the Forest Service, Interior retained management authority over the minerals underneath the forests. See 33 Stat. 628, 16 U.S.C. § 551. Being the principal manager of federal minerals, Interior is the agency deserving the most deference regarding implementation of fed-

eral mineral policy. See, e.g., Udall v. Tallman, 380 U.S. 1 (1965). Yet Interior's counterpart regulations to control the environmental impacts of Mining Law operations on Bureau of Land Management lands are equally preservative of state regulation. See 43 C.F.R. § 3809.3-1 (1985); 45 Fed. Reg. 78902, 78908 (1980).

As the Department of the Interior's administrative tribunal put it only last year, Mining Law operations "today are restrained or inhibited by an entire body of law comprised of State and federal statutes and regulations and judicial and administrative precedent," which has created a "broad, comprehensive range of Federal and State environmental laws and regulations which every citizen must observe, including . . . miners." U.S. Forest Service v. Milender, 92 I.D. 175, 183, 184 (1985). As this shows, promotion of mining is not a talisman, and to allow it to

control preemption is simply inconsistent with the traditional exercise of state power over mining on federal lands.

V. PRINCIPLES OF FEDERALISM COUNSEL AGAINST FINDING CALIFORNIA'S PERMIT REQUIREMENT FACIALLY PREEMPTED

This Court has consistently recognized that a state's interest in protecting the health of its economy and its natural environment is an intrinsic part of its sovereignty, see, e.g., Sporhase v. Nebraska, 458 U.S. 941 (1982), and that environmental protection is especially amenable to state regulation. See, e.g., Askew v. American Waterways Operators, 411 U.S. 325, 328-29, 332-37 (1973). Where, as in the American West, federal lands comprise much of the area within a state's borders, these legitimate concerns assume additional force, especially because judicially enforceable constitutional protections for state sovereign interests vis-a-

vis federal lands have largely disappeared, see Kleppe v. United States, 426 U.S. 529 (1976), and are not at issue here.

But the statutory and common law protections the states continue to enjoy depend upon vigilant judicial enforcement. This Court has met that challenge in cases like California v. United States, 438 U.S. 645 (1978). And this Court has recently cautioned that state and local authorities must be given full opportunity to pass on objections to their exercise of regulatory power, in their own administrative processes, before issues of federal law growing out of those regulatory systems are ripe for federal court review. Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. ____, 105 S.Ct. 3108, 3117-19 (1985). But here, the Ninth Circuit has inferred preemption of the state permit requirement on the flimsiest of grounds, thus in effect "seeking out

conflicts between state and federal regulation where none clearly exist," in violation of this Court's instructions. See Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 446 (1960).

A proper regard for our federal system requires that California be given the opportunity to demonstrate, by actual implementation of its permit authority, that no real conflict exists with federal law. The tradition of state-federal partnership in the management of federal lands is strong and enduring, a not insignificant by-product of the westward expansion of the United States and the retention of vast tracts of land in federal ownership. That tradition should not be lightly cast aside. Departures from it should require a rather compelling showing that Congress has actually decided, in a specific context, that partnership is inappropriate.

Very broadly, the question in this

case concerns the reach of state regulatory power over federal lands managed under a very general congressional authorization of "multiple uses" of these lands. See 16 U.S.C. §§ 528-31; see also 43 U.S.C. § 1732 (federal lands managed by the Bureau of Land Management). These lands must be distinguished from other federal lands where Congress has established much narrower management goals, such as national parks (see 16 U.S.C. § 1), wildlife refuges (see 16 U.S.C. § 668dd), or wilderness areas (see 16 U.S.C. §§ 1131-1136). The preemption analysis for lands in these latter categories properly proceeds along somewhat different lines, because the more circumscribed congressional management objectives warrant more careful scrutiny of the consistency of state regulation with those objectives. Cf. United States v. New Mexico, 438 U.S. 696, 709-711 (1978); United States v. Little Lake Misere Land

Co., 412 U.S. 580 (1973). On multiple use lands, by contrast, where Congress has itself neither prescribed a specific mix of uses nor explicitly displaced state regulatory power, private users of those lands seeking to escape state regulation ought to bear a heavier burden of showing that state regulation actually thwarts federal management policies.[17]

Moreover, where Congress acts to narrow the management objectives for certain federal lands such as national parks, wildlife refuges, or wilderness areas, the

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17. Indeed, the court of appeals here conceded that the Mining Law and the agency regulations did not "go so far as to [strike] a federally determined balance between encouraging mining and protecting the environment in national forests." 768 F.2d at 1083. Like environmental regulation generally, the state regulation here is aimed at ensuring that the miner, his customers, and the consumers of the products made from the mineral bear an appropriate share of the costs of mining, an especially legitimate concern on federal multiple use lands.

political safeguards of federalism come fully into play. Cf. Garcia v. San Antonio Metropolitan Transit Authority, ___ U.S. ___, 105 S.Ct. 1005 (1985). These safeguards generally operate in such a way as to make it very difficult to establish, say, a national park, wildlife refuge or wilderness area on federal land within a state without the affirmative support, or at least the acquiescence, of that state, expressed through its congressional delegation. The substantial displacement of state regulatory power that typically accompanies these designations thus occurs through a constitutionally contemplated process of consultation with, and de facto consent by, the affected state.

But multiple use lands, like the ordinary national forest land involved here, are different. Congress has authorized a much broader spectrum of activities on these lands, and the very breadth of possi-

ble activities means that there is no single, narrow national interest in how specific tracts of these lands are managed.

Similarly, it is significant that the state here seeks to regulate not the federal government, but only private entities. This Court's decisions on state authority to regulate activities undertaken directly by the federal government reach varying results, depending on the particular legislative setting. Compare California v. United States, 438 U.S. 645 (1978), with Hancock v. Train, 426 U.S. 167, 178-82 (1976), and Environmental Protection Agency v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 211-13 (1976). But considerations of federal supremacy are different when a state seeks to regulate a private entity engaging in activity Congress has merely au-

thorized, but not required.[18]

It is also worth noting that the typical congressional approach to environmental regulation has been to supplement rather than displace local standards. See, e.g., 30 U.S.C. § 1255 (Coal Surface Mining Control and Reclamation Act); 42 U.S.C. § 7416 (Clean Air Act); 33 U.S.C. § 1370 (Clean Water Act). The Mining Law and related Forest Service statutes can readily be understood as taking the same approach

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18. Even with respect to activities undertaken by the federal government directly, the advantages of a partnership with state regulators have proved irresistible to Congress in many situations. Thus, the decisions of this Court in the Hancock and EPA v. California cases, supra, which had the effect of insulating federal agencies from state environmental permit requirements, were swiftly reversed by Congress in the 1977 amendments to both the Clean Air and Clean Water Acts. See 91 Stat. 711 (1977), 42 U.S.C. § 7418 (Clean Air Act); 91 Stat. 1597, 1598 (1977), 33 U.S.C. § 1323 (Clean Water Act); see also 1977 U.S. Code Cong. & Admin. News pp. 1089-90 (Clean Air Act), and p. 4392 (Clean Water Act).

--establishing nationally applicable minimum standards of environmental care, but giving the states authority to supplement and apply more stringent standards where they deem appropriate.

Moreover, there is every reason to believe that the states take their responsibility seriously and do not exercise their authority arbitrarily. States derive significant benefits from activities conducted on federal land--not the least of which are employment opportunities for their citizens and other economic benefits provided by activities such as mining. Thus, there is no reasonable basis for assuming that states will inevitably be hostile to mineral development. Congress has not so assumed, and neither has this Court.

A genius of our federal system is the structural basis it establishes for measured compromise between national and local interests. The federal land manage-

ment statutes, like the Mining Law and the National Forest Organic Act, are replete with such compromises, giving the states a meaningful role in regulating private activities on federal lands. Moreover, by sharing regulatory power among jurisdictions, cooperative federalism provides a welcome buffer against the destabilizing effects of abrupt shifts in the policies of successive national and state administrations on questions as sensitive as federal land management.

The decision below wreaks havoc with these carefully crafted compromises. The Ninth Circuit here would shut the state almost entirely out of the regulatory process simply because of the speculative fear that, in some cases, it might act contrary to Congress's will. But recognizing State Coastal Commission permit jurisdiction does not require tolerating abuse of this power, for it does not com-

promise in any way the abilty of the federal courts to review the Commission's actual exercise of regulatory authority.

Moreover, state abuse of its authority could easily invite Congress to redress the preemption question. That body has a readily available, potent remedy in its property clause power, Art. IV § 3, to alter the balance between state and federal interests it has previously struck. See Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 223 (1983).[19]

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19. It bears underscoring that this Court's often-cited dictum in Camfield v. United States, 167 U.S. 518, 526 (1897), warning against placing "the public domain of the United States completely at the mercy of state legislation," came in the context of upholding Congress's constitutional power to fashion federal rules to protect federal lands, and said nothing about state regulatory power over those lands in circumstances like those presented here.

In short, numerous checks operate to prevent abuse of state regulatory authority. Ironically, by foreclosing direct state regulation in an attempt to "keep the applicable environmental requirements within the range of reasonableness," 768 F.2d at 1083, the Ninth Circuit here complicates life for both the federal agencies and the mining claimant by eliminating the only practicable way for state environmental standards to be applied to Granite Rock. Cf. Jones v. Rath Packing Co., 430 U.S. 519, 531, n. 18 (1977). Its decision provides confusing instructions to district rangers implementing the Forest Service regulations in the field, 768 F.2d at 1083, leaving them in an exceedingly awkward position.

Moreover, the approach of the Ninth Circuit poses serious problems to federal land managers in a wide variety of contexts. At the least, it seems to have

held that the state cannot directly enforce its building codes, sanitation, health, safety, and similar laws by means of a permit requirement, but must instead rely on the goodwill and bureaucratic energy of the federal land management agencies to take heed of state policies and requirements.

Clearly this is an area where a relatively bright-line test is desirable. Historically, this Court has taken the position that states may exercise jurisdiction over private activities on federal multiple use lands unless and until Congress acts to displace them. See, e.g., Kleppe v. New Mexico, 426 U.S. 529, 543 (1976); McKelvey v. United States, 260 U.S. 353, 359 (1922); Omaechevarria v. Idaho, 246 U.S. 343, 346 (1918) (Brandeis, J.). More recently, this Court has brightened the line somewhat in the closely related context of water resource manage-

ment; namely, that state laws, including permit requirements, are fully applicable even to activities undertaken directly by the federal government unless Congress has spoken firmly to the contrary. California v. United States, 438 U.S. 645, 678 (1978).

The history of state power over mining is not substantially different from that over water; indeed, the tradition of federal deference in each case springs from the same statutory source--the Mining Law. The Ninth Circuit decision is an abrupt, radical departure that disregards this parallel, ignores precedent, and is wholly insensitive to the vital interests of the states in protecting the environment within their borders. This Court should confirm the contemporary, and the traditional, practice that private activities under the Mining Law, and indeed private activities on multiple use lands generally, are subject to state regulatory

authority until Congress plainly says otherwise.

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AMICUS CURIAE

BRIEF

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On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* THE BIG SUR FOUNDATION, NATURAL RESOURCES DEFENSE COUNCIL, INC., THE SIERRA CLUB, AND THE WILDERNESS SOCIETY IN SUPPORT OF APPELLANTS

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PARTIES

This *amicus curiae* brief is filed by The Big Sur Foundation, Natural Resources Defense Council, Inc., the Sierra Club, and the Wilderness Society in support of the appellant California Coastal Commission. Each of these *amici* is a public interest organization which is interested in protecting the quality of the environment on and around Pico Blanco Mountain and in the proper enforcement of the California Coastal Act generally and specifically with respect to Granite Rock's mining operation on Pico Blanco. This brief is filed with the consent of all parties to the case. A copy of the written consent by each of the parties is filed concurrently with this brief.

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INTRODUCTION AND SUMMARY

The Big Sur Foundation, Natural Resources Defense Council, Inc., The Wilderness Society, and the Sierra Club submit the following *amicus curiae* brief. We urge the Court to reverse the Ninth Circuit and to hold that the California Coastal Commission's permit authority is not preempted by federal law. We agree with the arguments made by the Coastal Commission in its brief and we give further reasons why the Coastal Commission's permit authority is not preempted.

Our brief is in two parts. First, we show that the Coastal Commission is explicitly authorized by federal law to exercise its police power by placing permit conditions on Granite Rock's mining operation to control the water and air pollution, solid waste, noise, and safety and fire hazards which it causes. Federal law authorizes, not preempts, the exercise of these powers by the state.

Second, we show that the Coastal Commission regulates other consequences of Granite Rock's operation, in addition to those identified above, including environmental impacts which occur outside the boundaries of the national forest as well as social and economic consequences to the local community, and that the Forest Service regulations do not address these concerns. The Coastal Commission's permit program fills a regulatory vacuum, is not an obstacle to federal purposes or objectives, and survives preemption for the reasons given by this Court in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) and *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983).

As we show, the purposes and objectives of the federal and state regulatory programs are compatible and are advanced by the division of federal and state authority which is established by the regulatory schemes involved in this case.

I. Federal Law Authorizes the Coastal Commission to Regulate Granite Rock By A Permit

The central issue in this case can be stated simply. The issue is whether, as the Ninth Circuit wrote: "Forest Service regulations mandate that the power to prohibit the initiation or continuation of mining in national forests for failure to abide by applicable environmental requirements lies with the Forest Service" and whether "an independent state permit system to enforce state environmental standards would undermine the Forest

Service's own permit authority and thus is preempted." (Jurisdictional Statement Appendix ("J.S. App."), A-9).

The Ninth Circuit's answer to this issue is, we believe, erroneous. As we show, the Court entirely ignored a substantial body of federal environmental law which authorizes states to place permit conditions on private activities on federal lands to control, among other things, water and air pollution, solid waste, noise, and safety and fire hazards. It ignored evidence that Granite Rock's operation causes each of these problems and that the Forest Service did not control them. It further disregarded state law, which gives authority to the Coastal Commission to regulate these impacts. We discuss each of these impacts and show that the Coastal Commission's permit authority is not preempted by federal law.

A. Water Pollution

The California Coastal Act requires a coastal permit for any development which results in the "discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste" or in any other "change in the intensity or use of water . . ." within the coastal zone. (California Coastal Act ("CA"), Public Resources Code §§ 30106, 30600, J.S.App. A-62, A-83). The Act mandates that "biological productivity and the quality of coastal . . . streams . . . appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through . . . controlling runoff . . . [and] maintaining natural vegetation buffer areas . . ." (CA § 30231, J.S.App. A-68). The Coastal Commission is obligated to assure that coastal developments do not "frustrate" state efforts to control water pollution (CA § 30412) and it may issue a coastal permit if these water quality objectives are satisfied. (CA § 30604, J.S. App. A-68)

The State of California was concerned about the water pollution which may result from Granite Rock's mining

project. Before the Forest Service plan of operation was approved in 1981, the California Regional Water Quality Control Board urged that a stream monitoring program be implemented "to obtain sediment background data on nearby streams prior to expanding [Granite Rock's] quarry." The quarry was expanded but, even though the Forest Service acknowledged a "potential for point pollution" (Joint Appendix ("J.A.") 48) and a "probability of spawning habitat degradation for fresh water anadromous fisheries" (J.A. 50), no monitoring program was implemented. In 1983 the Coastal Commission discovered that Granite Rock's bulldozing operations at a location near the quarry had caused or contributed to "at least three landslides" and was depositing "sediments directly into the Little Sur River." (Appendix). The Little Sur, whose headwaters are in the national forest, passes within only about 2,000 feet of Granite Rock's quarry on federal land (J.A. 48) before flowing outside the boundaries of the national forest. State planners have designated the river an important habitat for steelhead trout, waterfowl, and shorebirds, and the California Legislature has declared that the river has "unique qualities and values which should be preserved." (California Protected Waterways Act, Cal. Stats. 1973, Res. Ch. 113) Clearly the state has a legitimate interest in protecting the Little Sur from pollution.

The Coastal Commission's authority under state law to place permit conditions on Granite Rock's water pollution is not preempted but is approved by federal law. The Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §§ 1251 *et seq.*, was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The policy of the Act is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . ." 33

U.S.C. § 1251(b). States with federally certified water pollution control programs may enforce state permit programs in lieu of the federal permit program. 33 U.S.C. § 1342(b), (c). In California, the State Water Resources Control Board is the agency which manages the State's federally certified program. In addition, however, the FWPCA expressly provides that states retain their general police powers to "adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution." 33 U.S.C. § 1370. The Coastal Act is an exercise of those state police powers. The Forest Service and the Ninth Circuit, however, apparently assumed that the Coastal Commission does not have authority to regulate water pollution and that the California Water Quality Control Board is the only state agency with such authority. (J.A. 45). This conclusion is wrong. The Water Quality Control Board has "primary" but not exclusive authority under state law to regulate water pollution. (CA § 30412) The Coastal Commission has authority under the Coastal Act both to regulate water pollution and to "coordinate and integrate the activities of the many agencies whose activities impact the coastal zone, and to supplement their activities. . ." (CA § 30004(b), J.S. App. A-58).

A private party such as Granite Rock, simply because it operates on federal property, is not immune from state water pollution regulations. *United States v. Pennsylvania Environmental Hearing Board*, 584 F.2d 1273, 1280 (3d Cir. 1978). Even the federal government itself must comply with "all" state water pollution permit requirements with respect to its activities, including such essential activities as the operation of defense facilities. 33 U.S.C. § 1323(a), (reversing this Court's holding to the contrary in *Environmental Protection Agency v. California*, 426 U.S. 200 (1976); see also 1977 U.S. Code Cong. and Admin. News, p. 4392.) This provision requires the federal government to comply with "all" state

permit requirements. It does not distinguish between state requirements which are part of a state's federally certified program and those which are adopted by a state pursuant to its preserved police powers. It also does not give an exemption to private parties which operate on federal lands. As the Third Circuit said in *United States v. Pennsylvania Environmental Hearing Board*, *supra* at 1280: "Inasmuch as Congress has inclined toward restricting immunity from pollution control even for acknowledged federal agencies, we see no reason to broaden immunity as it relates to the private sector." In short, there is simply no exemption in the FWPCA for mining projects on federal land.

The Forest Service mining regulations provide a further independent basis for requiring Granite Rock to obtain a permit from the Coastal Commission to regulate water pollution. The mining regulations state that Granite Rock "shall comply with applicable . . . State water quality standards. . ." (36 C.F.R. § 228.8(b)). The Ninth Circuit apparently concluded, however, that a state "permit" is not a "standard" and that, therefore, the Coastal Commission may "urge" the Forest Service to withhold or revoke a federal plan of operation from Granite Rock but may not independently require it to obtain a permit. The Court's distinction, however, between a "standard" and a "permit" is unsupported. To the contrary, Executive Order 12088, (October 13, 1978, 43 F.R. 47707), which requires federal agencies to comply with all "applicable [state] pollution control standards," defines "standards" as all "substantive, procedural, and other requirements." (E.O. 12088, §§ 1-102, 1-103) It includes state permit requirements. *Sierra Club v. Peterson*, 705 F.2d 1475, 1477 (9th Cir. 1983) (Forest Service must obtain state permit under Federal Insecticide, Fungicide, and Rodenticide Act to spray pesticides on national forest land) We see no reason why the federal government would subject its own facilities to state water pollution permit programs but would intend

to exempt private parties such as Granite Rock simply because they conduct mining operations on federal lands.

The distinction between a standard and a permit is not only unsupported but is also substantively meaningless. The Court was apparently concerned that by withholding or revoking a "permit" the state could halt Granite Rock's mining project altogether. But this concern is not avoided by stripping away the state's permit program. By setting state environmental requirements (as distinguished from permits), which the Ninth Circuit did not forbid, and suing to enjoin any violations of those requirements, the state can effectively stop the project if it chooses to do so. The essential question, then, is whether the state has authority in the first place to halt the project, not whether it may use one tool—a permit—rather than another—a "standard" (as defined by the Ninth Circuit). We consider this question in Part II.

The consequences of forbidding states from exercising their permit authority under the FWPCA with respect to mining operations on federal lands are drastic not only in this case but throughout the nation. It is well known that mining projects may discharge pollutants, including toxic chemicals, into nearby waterways. *Hard Rock Mining on the Public Lands*, Council on Environmental Quality, U.S. Govt. Printing Office (1977), p. 13. The Forest Service generally does not regulate these discharges but, consistent with the mining regulations, relies on the greater experience of the states to do so. If the states are denied the right to employ their preferred enforcement tool—permits—these discharges will be regulated less effectively, if at all, and miners on the federal lands will be given an unjustified competitive advantage over miners on private lands.

B. Air Pollution

The California Coastal Act is intended to regulate coastal developments which cause the discharge of any "gaseous . . . [or] solid . . . waste" to the coastal zone.

(CA § 30106, J.S.App. A-62) Although the Coastal Commisison does not have authority under state law to establish particular air pollution emission limits, the Coastal Act does require that all new developments in the coastal zone be consistent with air pollution requirements imposed by local air pollution control districts or the State Air Resources Control Board. (CA § 30253 J.S.App. A-77) The Act authorizes the Coastal Commission to "complement or assist" in the implementation of these established air quality programs. (CA § 30414) If a development is inconsistent with these programs, a coastal permit is not issued. (CA § 30604, J.S.App. A-84) Granite Rock's operation causes dust to be released to the air and therefore is a legitimate concern of the Coastal Commission as it assists in the implementation of air quality programs. (J.A. 36)

The Coastal Commission's authority to assist in the implementation of state air pollution control programs was effectively stripped away by the Ninth Circuit's preemption holding because it left the Commission with no practical means to assist in the implementation of state air quality programs. The Ninth Circuit erred because the Coastal Commission's permit program is authorized, not preempted, by federal law. The Clean Air Act, ("CAA") 42 U.S.C. §§ 7401 *et seq.*, is intended "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population. . ." 42 U.S.C. § 7401(b)(1). The policy of the Act is "that the prevention and control of air pollution at its source is the primary responsibility of State and local governments. . ." 42 U.S.C. § 7401(a)(3). The CAA authorizes states to regulate air pollution by enforcing federally approved state implementation plans (42 U.S.C. § 7410) and also by exercising their inherent police powers which are expressly retained by the CAA. (42 U.S.C. § 77416) There is no exemption from state air pollution regulation, under either federally approved implementation plans or

exercises of the police power, for mining operations on federal lands. Indeed, as under the FWPCA, federal agencies themselves must comply with "all . . . state . . . requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity . . . [including] any requirement respecting permits. . ." 42 U.S.C. § 7418(a), (overruling this Court's holding to the contrary in *Hancock v. Train*, 426 U.S. 167 (1976); see also 1977 U.S. Code Cong. and Admin. News, p. 1089) As stated in *United States v. Pennsylvania Environmental Hearing Board*, *supra* at 1280, there is no reason to extend broader immunity to the private sector than the federal government gives to itself.

The Forest Service mining regulations provide further independent authority for the Coastal Commission to place permit conditions on Granite Rock's air pollution. The regulations (36 C.F.R. § 228.8(a)) require Granite Rock to "comply with applicable . . . State air quality standards . . . ." Under Executive Order 12088 and *Sierra Club v. Peterson*, *supra*, state "standards" include permits.

C. Solid Waste Disposal

The Coastal Act requires a permit for any development which results in the "disposal of any . . . solid . . . waste . . ." in the coastal zone. (CA § 30106, J.S.App. A-62) Granite Rock's quarrying project generates solid waste, including overburden and spoils. (J.A. 35-37, 43)

The Resource Conservation and Recovery Act, ("RCRA") 42 U.S.C. §§ 6901 *et seq.*, declares that the "disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment. . ." 42 U.S.C. § 6901(b)(2). Congress declared that the "disposal of solid waste, (including 'discarded material' resulting from mining operations) should continue to be primarily the function of State, regional, and local

agencies. . . ." 42 U.S.C. § 6901(a)(4); 42 U.S.C. § 6903(27). This Court has already stated that a portion of New Jersey's law regulating solid waste disposal is not preempted by RCRA. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). No exception to this policy of state regulation is made for mining operations on federal lands. Indeed, as under the FWPCA and the CAA, federal agencies must comply with state requirements governing the control and abatement of solid waste, including state permit requirements, to the same extent as private parties. 42 U.S.C. § 6961, (see also 1976 U.S. Code Cong. and Admin. News, p. 6283)

The Forest Service mining regulations also provide a separate independent basis for requiring Granite Rock to obtain a coastal permit governing solid waste disposal. The regulations require miners to comply with "applicable . . . State standards for the disposal and treatment of solid wastes." (36 C.F.R. § 228.8(c)) These "standards" include permits. E.O. 12088; *Sierra Club v. Peterson, supra.*

D. Noise Control

The authorization which the Coastal Act gives to the Coastal Commission to control impacts which "significantly degrade" "environmentally sensitive habitat areas" (CA § 30240, J.S.App. A-73) authorizes the Coastal Commission to regulate noise which results from coastal developments. Granite Rock's mining operations, including its blasting to fracture the ore body and its operation of earth moving equipment, clearly cause a severe noise problem for animal as well as human habitats in the coastal zone. (J.A. 36)

Federal law does not preempt Coastal Commission authority to regulate noise by the imposition of permit conditions. To the contrary, the Noise Control Act states that "primary responsibility for control of noise rests with State and local governments. . . ." (42 U.S.C.

§ 4901(a)(3)). No exception is made for mining operations by private parties on federal lands. Indeed, Federal agencies "shall comply with . . . state . . . requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements." 42 U.S.C. § 4903(b) While federal law in some instances has preempted state regulation of noise caused by certain kinds of facilities, including railroads (*Baltimore & Ohio Railroad Company v. Oberly*, 606 F. Supp. 1340 (D.Del. 1985), motor carriers (42 U.S.C. 4917(c)), and airports (*City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 630 (1973) (because federal regulation of airport noise, unlike mining, is "comprehensive"), federal law has never, to our knowledge, preempted a state's regulation of noise caused by mining operations.

E. Public Safety

The Forest Service mining regulations require that "hazardous sites or conditions resulting from operations shall be marked by signs, fenced or otherwise identified to protect the public in accordance with Federal and State laws and regulations." (36 C.F.R. § 228.9) The Coastal Act is one such state law intended to govern public safety. (CA 30001(c), J.S.App. A-56) Among other things, the Act requires new coastal developments to minimize "geologic, flood, and fire hazards" (CA 30253, J.S.App. A-77). Obviously, a large quarry and extensive haul roads, such as Granite Rock's, create public safety hazards. In fact, the blasting is so hazardous that surrounding areas must be evacuated by the public while it is conducted. (J.A. 36, 45) The minimization of safety hazards is a condition for a coastal permit (CA 30604, J.S.App. A-84).

F. Fire Hazards

The Forest Service mining regulations require Granite Rock to "comply with all applicable Federal and State fire laws and regulations. . ." (36 C.F.R. § 228.11) 16 U.S.C. § 553 further requires the Forest Service to "in

all ways that are practicable, aid in the enforcement of the laws of the States . . . for the prevention and extinguishment of forest fires . . ." on national forest lands.

The Coastal Act requires coastal developments to minimize fire hazards (CA §§ 30253(1), 30604, J.S.App. A-77, A-84). The risk of fire is severe up and down the California coastline, particularly on the dry, grassy slopes of Pico Blanco, and in recent years forest fires have caused serious damage to property and the environment in the Big Sur area. Granite Rock creates a fire hazard using internal combustion engines and explosives at its quarry.

G. Conclusion to Part I

As shown, federal law specifically authorizes states to regulate by permit certain environmental and safety problems caused by mining operations on federal lands. State law empowers the Coastal Commission to regulate those problems by using the tool of a permit. Clearly, we believe, the Ninth Circuit erred when it held these powers preempted by federal law. Even the Alaska Miners Association agrees that "the state should remain free to regulate and permit those . . . areas the federal government asks the states to regulate, such as air and water quality. . . ." (Brief Amicus Curiae of Alaska Miners Association, *et al.*, in Support of Appellee's Motion to Dismiss Appeal, or Affirm Judgment Below, pp. 2-3). If for no other reason, therefore, the Ninth Circuit should be reversed so that California and other states may exercise their powers to carry out the environmental quality and safety programs as Congress and the Forest Service regulations intend.

II. The Coastal Commission Permit Program Does Not Undermine the Forest Service's Authority

The Ninth Circuit concluded that the Coastal Commission's permit authority "intrudes into the sphere" of Forest Service permit authority and is preempted because it

would "undermine the Forest Service's own authority." This conclusion, we believe, interprets the authority of the Coastal Commission too narrowly and the authority of the Forest Service too broadly. The state permit program does not intrude into the sphere of the federal permit program; the two programs occupy different spheres.

The Coastal Act authorizes the Coastal Commission to regulate by permit various effects that developments have on the coastal zone. These include the effects described in Part I as well as effects on public health (CA § 30001(c), J.S.App. A-56), economic and social well-being (CA § 30001(d), J.S.App. A-56), recreation (CA § 30001.5(c), J.S. App. A-57; § 30253(5), J.S.App. A-77), flood control (CA § 30236, J.S. App. A-71), and energy conservation (CA § 30253, J.S. App. A-77). The Forest Service mining regulations, on the other hand, do not address these concerns. The "secondary socio-economic and growth effects" of Granite Rock's project, including the employment effects, the "need for increased public facilities," and "energy requirements and conservation measures," were either not discussed at all by the Forest Service in its environmental assessment or were declared for some unspecified reason to be "not applicable." (J.A. 56, 57) The Forest Service regulations are designed simply to minimize "environmental" impacts occurring "on National Forest System surface resources" (36 C.F.R. § 228.1). They are not explicitly designed to address these additional concerns.

Granite Rock's operation causes impacts which extend beyond the two subjects of Forest Service regulation. To the extent the project is environmentally disruptive, it hurts a major local industry—tourism—which accounts for some 2.9 million visitors to the area each year. (Monterey County Big Sur Coast Land Use Plan, November 1985, p. 66) It strains local public services, including roads. Clearly it affects the "economic and social well-

being" of coastal residents and is a proper subject of Coastal Commission regulation. Moreover, it is only fair that if Granite Rock obtains the benefit of state and local government services, such as the economic analysis of the limestone deposit by the California State Division of Mines and Geology (J.A. 100-101), and the use of public roadways, it should also assume the burden of state and local regulation.

The operation also causes environmental impacts which extend beyond the boundaries of the national forest and therefore beyond the scope of the Forest Service regulations. The impacts discussed in Part II—water and air pollution, solid waste disposal, noise, safety, and fire—create potential problems outside the national forest. Hauling ore from the site in large trucks travelling along private and public roadways, including State Highway Route 1 (J.A. 101, 102) causes pollution, congestion, and safety hazards. (J.A. 39) Route 1 is a narrow, winding two lane road which the Legislature intends to maintain in Big Sur as a "scenic two-lane road" (CA § 30254, J.S. App. A-77). The Coastal Commission has good reason to be concerned that the road will be unable to withstand uncontrolled truck traffic and that the truck traffic, if unregulated, will violate the Coastal Act's requirement that developments "minimize . . . vehicles miles traveled." (CA § 30253(4), J.S.App. A-77). Blasting at the site interferes with wildlife and human habitat outside the national forest. Visual scarring to the mountain interferes with the public's use of nearby Molera State Park, and other non-federal lands, for recreational and other purposes. (J.A. 47) Clearly these operations cause very serious environmental impacts which are outside the scope of what the Forest Service intended to regulate. The Forest Service concedes there are "environmental components" which were "not under the enforcement authority of the U.S. Forest Service." (J.A. 36) In short, there is a regulatory vacuum.

Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, (1983), held that a general federal purpose to encourage a particular activity does not preempt state regulation, including regulation by permit, which incidentally prohibits the activity by regulating an area of traditional state concern other than the specific field of federal regulation. In *Pacific Gas* the general federal purpose was to encourage nuclear power development and preempt state safety regulation. The Court concluded, nevertheless, that the federal agency did not purport to exercise regulatory authority over the economics of nuclear power plants and therefore the state economic regulation survived preemption.

This case is controlled by *Pacific Gas*. Here, the general federal purpose is to encourage certain mining activities on some federal lands. The Forest Service regulates only some of the environmental impacts resulting from mining. The state, on the other hand, regulates, in addition to the impacts discussed in Part I, non-environmental impacts, as well as environmental impacts which occur outside the national forest boundaries. This is the most reasonable way to interpret both the federal and state regulatory schemes. It is also the interpretation which avoids a Constitutional conflict between the state and federal laws, promotes the concept of "cooperative federalism," *California v. United States*, 438 U.S. 645, 650 (1978), and is the interpretation which the Ninth Circuit should have favored. Unfortunately, it did not. The Alaska Miners Association agrees. As the Association stated, it "believe[s] that the state should remain free to regulate and permit those issues not regulated by the federal government . . . ." (Brief Amicus Curiae of Alaska Miners Association, *et al.* in Support of Appellee's Motion to Dismiss Appeal, or Affirm Judgment Below, pp. 2-3).

The Ninth Circuit not only misconstrued the scope of both the Forest Service and the Coastal Commission reg-

ulatory responsibilities, it also proved too much. If the Ninth Circuit decision stands, California and other states may be denied all permit authority over mining operations conducted under the 1872 Mining Law and may be left unable to regulate by permit many things which they have traditionally regulated in the past. They will theoretically be unable to require a permit from the Commissioner of Corporations before mining companies can conduct business on federal lands within the state because, under the Ninth Circuit's reasoning, the power to deny a permit is the power to veto. They will be unable to demand that mining company drivers obtain drivers licenses to operate vehicles associated with mining projects or to insist on building permits to assure compliance with local building, health, and sanitation codes. To conclude that all state permit authority is preempted, as the Ninth Circuit did, is to stretch the purposes of the Mining Law beyond recognition, to drastically and in one broad swipe cripple the traditional exercise of a wide range of state police powers, and to elevate the policy of promoting mining over all other public policies. For this there is no authority.

A better rule, we believe, is that a state may place permit conditions on mining operations under the 1872 Mining Law provided that it does not: 1) discriminate against the operation simply because it involves the federal government, *United States v. County of Fresno*, 429 U.S. 452 (1977), *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 269 (1943); or 2) "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas and Electric v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 204 (1983). In this case there is no evidence of either.

First, there is no evidence that the Coastal Commission will place discriminatory permit conditions on Granite Rock's operation. The standards which the Commission must follow when it considers a permit are defined by

the Coastal Act and case law; any violation of those standards gives an applicant clear legal remedies against the Commission. Certainly the risk that a state agency may exceed its authority under state law is no reason to hold the authority preempted.

Second, the Coastal Commission permit program is not an obstacle to federal purposes. The Ninth Circuit suggested that it would be an obstacle because it would: 1) be contrary to the objective of the Mining Law to encourage mining; 2) give the state a veto power over mining projects which would destroy the effectiveness of the Mining Law; 3) subordinate comprehensive federal planning to the state; and 4) undermine the Forest Service's ability to keep environmental requirements within the range of reasonableness. The Ninth Circuit erred, we believe, with respect to each of these points.

A. The encouragement of mining

The broad purpose of the federal laws is to encourage mining on federal lands but not to encourage mining, just as it is not to encourage nuclear power, "at all costs." *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, *supra*, 461 U.S. at 201. The Mining Act of 1872 is only one element in the overall, more balanced, federal policy toward mining on federal lands. Other elements reflect a wide range of policies which modify the policy of encouragement. In some circumstances the federal policy is to prohibit mining altogether. Thus, mining operations which are "unnecessary and unreasonably destructive of surface resources and damaging to the environment" may be enjoined. *United States v. Richardson*, 599 F.2d 290, 295 (9th Cir. 1979), *cert. den.*, 444 U.S. 1014 (1980). Entire parcels of federal land may be withdrawn from entry under the mining law by the President (*United States v. Midwest Oil Company*, 236 U.S. 459 (1915) or by the Secretary of Interior (43 U.S.C. § 1714). Other federal policies permit mining on federal lands only if the opera-

tions are conducted in compliance with certain environmental regulations. These policies are expressed in dozens of statutes governing the management of federal lands. See Freyfogle, *Federal Lands and Local Communities*, 27 Arizona L. Rev. 653 (1985).

State permit authority under the Coastal Act promotes not obstructs these balanced federal objectives. The Coastal Act intends to promote not only environmental quality but also the "economic vitality" and "economic and social well-being of the people of [California] and especially of working persons employed within the coastal zone." (CA § 30001(d), J.S.App. A-56, and § 30004(b), J.S.App. A-58). As the District Court concluded in this case, the federal and state regulations "do not clash but are instead analogous." (J.S.App. A-30)

B. State "veto" power

The Ninth Circuit further concluded that Coastal Commission permit authority over Granite Rock was preempted because it would give the state a "veto" power over mining rights which would destroy the effectiveness of the Mining Law of 1872. This conclusion is, we submit, erroneous.

First, it is merely speculation to conclude that the Commission will "veto" Granite Rock's project by denying a permit. In fact, the Commission has publicly stated that it will not do so. (Jurisdictional Statement 5)

Nonetheless, Granite Rock argues that the Commission may in fact place conditions on the permit which are so stringent and so costly to comply with that the operation will be rendered unprofitable and the federal policy of granting free entry onto federal land to acquire mining rights will effectively be vetoed by the state. This argument, we believe, shows a basic misunderstanding of the policy behind the federal mining law. Under the Mining Law of 1872, 30 U.S.C. § 22, a miner has a right to enter federal lands and mine only if the deposit he seeks to

mine is a "valuable mineral deposit." A deposit is a "valuable mineral deposit" only if it can be "extracted, removed, and marketed at a profit." *United States v. Coleman*, 390 U.S. 599, 600 (1968).

An agency of the Department of Interior, the Minerals Management Service, is the federal agency with authority to determine whether the profitability test is satisfied by a particular mining operation. In general, the Minerals Management Service compares the costs of operating a mine with the revenues that can be expected from the operation to determine whether a "valuable mineral deposit" has been discovered. Only if revenues exceed costs will the Service conclude that a miner has made such a discovery. Among the costs considered by the Service, in addition to capital, labor, and others, are the costs of complying with federal, state, and local environmental regulations. *United States v. Kosanke Sand Co.*, 80 I.D. 538 (1973) (on reconsideration); *United States v. Pittsburgh-Pacific*, 84 I.D. 282 (1977); *United States Steel Corp.*, 52 IBLA 319 (1981). Granite Rock concedes that these costs are to be considered in the determination. (J.A. 98)

If the cost of complying with environmental laws, state and federal, make a particular operation unprofitable, the miner does not have a "valuable mineral deposit" and he has no right against the government to enter the federal lands and mine. Thus, when the costs of compliance with state environmental regulations, and all other costs, are taken into account, a project may be "vetoed," but only in the sense that it will fall under its own weight. If the Ninth Circuit's reasoning is followed—and states may not "veto" a project in this way—then the states will have to bend or waive their legitimate environmental laws in order to accommodate unprofitable or marginally profitable mining projects. We see no reason why a state should have to do so. While the Forest Service, to be sure, believed it could not impose regulations which cause a miner to abandon a project for cost reasons

(believing that its regulation "must provide for the continuation of mining activities" (J.A. 49, 51)), we believe the Forest Service's position is unsupported by the law. It is also illogical. How can one determine whether it is environmental regulation, rather than the other costs of doing business, which "cause" an operation to be unprofitable? Why should a state have to compromise its environmental protection laws more the less profitable a mining operation happens to be? Why should the nature of environmental protection be a function of the economics of a particular mining project rather than of the environmental conditions in which the mining is conducted?

If there are limits to the extent to which a state may place environmental compliance requirements on a mining operation, those limits are not, we submit, defined by the Supremacy Clause. Certainly there are other limitations on state regulation which protect the legitimate interests of miners. If the state imposes conditions, for example, which amount to a taking of a private mining claim, then the miner should (and does) have remedies against the state. There is no reason, however, to assume that the Coastal Commission in this case will abuse its authority. The Coastal Act prohibits the Commission from taking private property without the payment of just compensation. (CA § 30010, J.S.App. A-61) Thus, if the Commission does take private property, there are other remedies besides preemption.

Finally, even if a state's permit requirements were to raise the costs and discourage a particular mining operation it would not necessarily create an obstacle to federal purposes or objectives. The affected miner can still mine elsewhere. If he does, there is no decrease in the overall level of mining and no frustration of the policy to encourage mining. State regulation would simply influence the location of mining operations, not the overall level. There is no policy in the federal law to promote mining on one particular parcel of federal land over another.

C. Subordination of comprehensive planning to the state

The Ninth Circuit further concluded that a state permit requirement would subordinate comprehensive federal planning authority to the state. This conclusion, we believe, was also erroneous. First, it was erroneous because there is no such thing as comprehensive federal planning with respect to private mining operations on federal lands. The Forest Service regulations purport to regulate only "surface resources" on "national forest" lands, not environmental impacts outside the national forest, non-environmental concerns, or certain environmental impacts which are regulated by the states. The Forest Service has not, to our knowledge, contended that its regulatory power is "comprehensive." The Alaska Miners Association agrees: "It is clear," the Association says, "that federal regulation under the Mining Law of 1872 is not so pervasive that all local law must be preempted." (Brief Amicus Curiae of Alaska Miners Association, *et al.*, in Support of Appellee's Motion to Dismiss Appeal, or Affirm Judgment Below, p. 9)

Second, the Ninth Circuit also erroneously assumed that Coastal Commission permit regulation is comprehensive. Coastal Commission regulation is not, however, "comprehensive" in the sense that it duplicates planning already performed by the Forest Service. The state is attempting to fill the regulatory vacuum that results from the limited scope of Forest Service regulation. The Coastal Act explicitly intends only to "provide maximum state involvement in federal activities allowable under federal law or regulations or the United States Constitution which affect California's coastal resources. . . ." (CA 30004(b), J.S.App. A-58) The Coastal Commission permit program and Forest Service mining regulations are examples of cooperative federalism, not infringement on federal planning authority.

D. The Forest Service's ability to keep environmental requirements "reasonable"

Finally, the Ninth Circuit believed that the state permit program would "undermine the Forest Service's ability to keep the applicable environmental requirements within the range of reasonableness," and would be a "second tier" of regulation. This conclusion, we believe, is flawed. As shown, the state's authority to regulate certain environmental impacts by issuing a permit is specifically authorized by federal laws which delegate authority to the states. The Forest Service may avoid a "second tier," if it wishes, simply by not regulating those impacts itself. The Coastal Commission permit program is not a "second tier;" it stands side-by-side the federal regulation.

CONCLUSION

The police power of the states extends over private activities on the federal public domain where there is no legislation by Congress on the subject which displaces state law. *Omaechevarria v. State of Idaho*, 246 U.S. 343, 346 (1917) Here there is none. Environmental pollution is peculiarly a matter of state and local concern, and the mere possession of a federal license which regulates other matters does not provide immunity from local pollution control requirements. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960) Here, the Ninth Circuit held it does. Courts should avoid "seeking out conflicts between state and federal regulation where none clearly exists." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130 (1978). Here the Ninth Circuit sought out a conflict. "[T]he proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 128 (1973), quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). Here the Ninth Circuit completely ousted the Coastal Act. It ousted the

Coastal Act even with respect to those provisions which serve purposes entirely different from the purposes of the federal regulation. In doing so, the Ninth Circuit never discussed the purposes or objectives of the Coastal Act. It merely assumed that the Act "intrudes into the sphere" of the Mining Law and the Forest Service mining regulations.

In this brief we examine the Coastal Act for what it says on its face. On its face it authorizes the Coastal Commission to regulate matters which federal law allows states to regulate as well as matters which federal law does not intend to regulate. It is difficult to imagine a more appropriate role for the state to play.

We urge the Court to reverse the Ninth Circuit and to hold that the Coastal Act is not preempted by federal law.

Respectfully submitted,

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Dated: June 6, 1986

APPENDIX

State of California, Edmund G. Brown, Governor

California Coastal Commission
Central Coast District
701 Ocean Street, Room 310
Santa Cruz, California 95060
(408) 426-7390

February 11, 1983

Mr. R.E. Johnson, Vice President
Granite Rock Company
P.O. Box 151
Watsonville, CA. 95077

Re: Pico Blanco Coalition vs. Granite Rock Co., et al, Monterey Superior Court

Dear Mr. Johnson:

We are in receipt of the Complaint in the above-referenced matter. Our staff investigated the site of the alleged violation on February 8, 1983. We found that substantial grading had taken place on the alignment of the public trail (U.S.F.S. #1E03) along the South Fork of the Little Sur River, beginning at the point where the trail crosses the river and extending easterly in the direction of the Ventana Wilderness. The estimated volume of earth movement appears to have exceeded 200 cubic yards, and has resulted in an apparent widening of the trail to "bulldozer width".

In addition, the grading work appears to have had caused, or contributed to, at least three landslides. These slides have blocked the trail and are depositing sediments directly into the river.

The grading which was observed appears to correspond to that which was brought to your attention by our letter of August 25, 1982. In your response of August 31, 1982, you assert that no grading had taken place "other

than . . . normal road maintenance". However, the grading observed on February 8, 1983, had taken place on a trail (not a road), and appears to substantially exceed reasonable upkeep requirements for a backcountry pedestrian trail. Coastal Act Section 30610(d) excludes from the coastal development permit requirement only those repairs or maintenance activities "which do not result in an addition to, or enlargement or expansion of the object of such repair or maintenance activities".

Based on our field observation, the work undertaken can in no way be interpreted as falling under the above section, and we believe, therefore, a violation has occured.

As you were advised previously, no additional work should be undertaken unless specifically authorized by this office or unless a coastal development pemit has first been issued. Pending resolution of the subject law suit or issuance of coastal development permit, immediate steps should be taken to mitigate the erosion, siltatation, and landslide hazards that have resulted from, or appear to have been aggravated by, the grading. In addition, the trail should be re-opened to normal pedestrian use.

Please contact this office to establish an appropriate plan of mitigation, and to secure authorization for such interim measures as may be needed for immediate slope stabilizaion and restoration of public access. Because the damage is continuing, you are requested to give your attention to this matter at the earliest possible date.

Sincerely,

/s/ [Illegible]
EDWARD Y. BROWN
District Director

cc: Roy Gorman
Dept. of Fish & Game
Monterey County
Pico Blanco Coalition
U.S. Forest Service

EYB/LO/deb

SUPPLEMENTAL

BRIEF

Supreme Court, U.S.
FILED
AUG 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA COASTAL COMMISSION, et al.,
Appellants,

VS.

GRANITE ROCK COMPANY,
Appellee.

On Appeal From The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO BRIEF OF BIG SUR FOUNDATION ET AL. AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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OPPOSITION TO BRIEF OF BIG SUR FOUNDATION ET AL. AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

Appellee Granite Rock Company[1] opposes and request that the Court strike portions of the Brief and Appendix filed in the above entitled matter by Amici Curiae The Big Sur Foundation, Natural Resources Defense Council, Inc., The Sierra Club, and The Wilderness Society ir support of Appellants. The offending material relates to a document that is not part of the record, is immaterial to the issues before the Court, and contains false information.

Amici Curiae's brief refers to and appends a letter dated February 11, 1983 from the California Coastal Commission to R.E. Johnson, Vice President of Granite Rock Company. The

[1] Pursuant to United States Supreme Court Rule 28.1, 28 U.S.C. (1984), there are no parent companies, subsidiaries, (except wholly owned subsidiaries) and affiliates of Granite Rock Company.

letter was never introduced into evidence in the District Court nor was it made part of the record in any of the proceedings involved in this case.

Only evidence on the record may be considered in a case on appeal. This has long been the rule in cases before this Court. *See Davis v. Packard,* 31 U.S. 41, 6 Pet. 41, 8 L.Ed. 312 (1832); *Boone v. Chiles,* 35 U.S. 177, 10 Pet. 177, 8 L.Ed. 647 (1836); *Russell v. Southard,* 53 U.S. 139, 157, 12 How. 139, 13 L.Ed. 927 (1851). The Court continues to refuse to consider documents containing material outside of the record. *New Haven Inclusion Cases,* 399 U.S. 392, 450 n.66, 90 S.Ct. 2054, 2088 n.66 (1970) [extra-record newspaper articles not considered]' *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 n.16, 90 S.Ct. 1598, 1608 n.16 [extra-record statement of witness in supplemental brief filed in this Court "cannot be properly considered by us in the disposition of this case."].

Case law also indicates that a motion to strike is the appropriate means for dealing with material outside of the record. *Lawn v. United States,* 355 U.S. 339, 354, 78 S.Ct. 311, 320, 2 L.Ed.2d 321 (1957) [party's motion to strike ". . . must be sustained as we must look only to the certified record in deciding questions presented."]; *Johnson v. United States,* 426 F.2d 651, 656 n.8 (D.C.Cir. 1970) [granting motion to strike "offending matter."].

Not only is the above mentioned letter outside of the record but is is immaterial to the issues before the Court. The letter refers to activities on land situated outside of the national forest. The movement of earth in this area is the subject of a pending state court lawsuit, *Pico Blanco Coalition v. Granite Rock, et al.,* Superior Court of the State of California, County of Monterey No. M12993, and in no way affects the issue of federal preemption involved in this case. Supreme Court rule 34.6 specifically requires that briefs be "free from burdensome, irrelevant, immaterial and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court."

Additionally, the information contained in the letter is untrue. On page 4 of their brief, Big Sur et al. suggest that Granite Rock's operations harmed the surrounding environment. As indicated in

the documents appended to this motion, which were filed in the State court lawsuit *Pico Blanco Coalition v. Granite Rock,* the only activity engaged in by Granite Rock on this land was the repair of a trail that had been washed away by heavy rains. *See* Declaration of Bruce Woolpert, p. 2-3 and Exhibit B to said declaration, letter from County of Monterey Department of Building Inspection. Neither the trail nor the Little Sur River were blocked by any grading activity of Granite Rock. See Declaration of Bruce Woolpert, Exh. B, p.2. The Amici brief, on page 3, also accuses the Ninth Circuit of ignoring the "evidence" of harmful environment impact. No evidence of this kind exists on the record or otherwise. If the "evidence" Amici refer to is the letter appended to its brief, this reference is improper because the letter is not on the record. If Amici have some other "evidence" in mind, they have not so stated, in contravention of Supreme Court Rule 34.5. The only possible reason that the Big Sur Foundation put this unsupported letter in the record is to unfairly prejudice Granite Rock. Introduction of the letter containing the unsubstantiated statement of the District Director of the Coastal Commission simply underscores the logic behind the rule limiting consideration to matter in the record. This Court is not and should not be a finder of fact.

For the above reasons and under the above authority, Appellee Granite Rock Company respectfully requests that the Court not consider and strike above-mentioned letter and references to it on pages 3 and 4 of Amici Curiae's brief.

Respectfully Submitted,

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DATED: August 18, 1986

Exhibit A

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Attorney for Defendants

Superior Court of California, County of Monterey

Case No. M 12993

Pico Blanco Coalition,
Plaintiff

vs.

Granite Rock Company, Maurice Alsop, California Department of Fish and Game, and Does 1 through X, inclusive
Defendants

Declaration of Bruce G. Woolpert
[Filed Nov. 17, 1983]

I, Bruce G. Woolpert, declare as follows:

1. I am the President of Granite Rock Company, one of the Defendants in the above entitled case and if called upon as a witness could testify competently to the following facts from my own personal knowledge and if called upon to do so, I will so testify.

2. Attached to this Declaration as Exhibit "A" is a sketch illustrating the section of the trail which is the subject of this lawsuit. The trail is located on an approximate 181 acre parcel of real property owned by Granite Rock Company. The portion of the trail in question runs along the south fork of the Little Sur River, crossing the Little Sur River on Granite Rock's property and then climbing the canyon on the north side of the south fork of Little Sur River and continuing along the contour up the lower slopes of Pico Blanco Mountain.

3. In August of 1982, Granite Rock Company performed certain repair work on the trail consisting of the grading of a single switchback of a moderate gradient, a total of approximately 471 ft. in length to replace an older, steeper portion of the trail. Prior to 1982, the older, steeper portion of the trail had fallen into disrepair because of heavy rains and a lack of maintenance and repair. That portion of the trail consisted of five sharp switchbacks and it was poorly marked and difficult to climb. Because of the deteriorating condition of the five switchback, steep portion of the trail, Granite Rock undertook the repair of the trail by establishing the single moderate gradient switchback, all as shown on Exhibit "A" hereto.

4. At the time the above described work was done, Granite Rock Company consulted the County of Monterey Building Department and determined that no permit was required from the County to do maintenance work if less than 100 cubic yards of earth would be moved. When we did the work, it was done with the good faith belief on our part that no permit was required. After the work was done, and as a result of the filing of this action, we learned for the first time that a grading permit would be required from the County because of the steepness of the verticle slopes where the trail was located, even though less than 100 cubic yards of earth were moved. In that regard, see the report of the Monterey County Department of Building Inspection dated February 15, 1983 under signature of Steve Borossay, Senior Engineer, attached to this declaration as Exhibit "B". We also learned afterwards that a Coastal permit may have been required.

5. Without conceding that a Coastal permit was in fact required, Granite Rock Company on May 6, 1983, filed an application with the California Coastal Commission for a permit to do the subject work (Permit No. 3-83-88). The permit was ultimately granted. However, the permit as granted was subjected to certain conditions which Granite Rock Company claims are entirely unrelated to the trail work and to which Granite Rock Company will not accede. The conditions imposed would require Granite Rock Company to relinquish its development rights for approximately 25 acres of the 181 acre parcel on which the trail is

located. Granite Rock Company has filed suit (Monterey County Superior Court Action No. 79877) to challenge the imposition of said conditions.

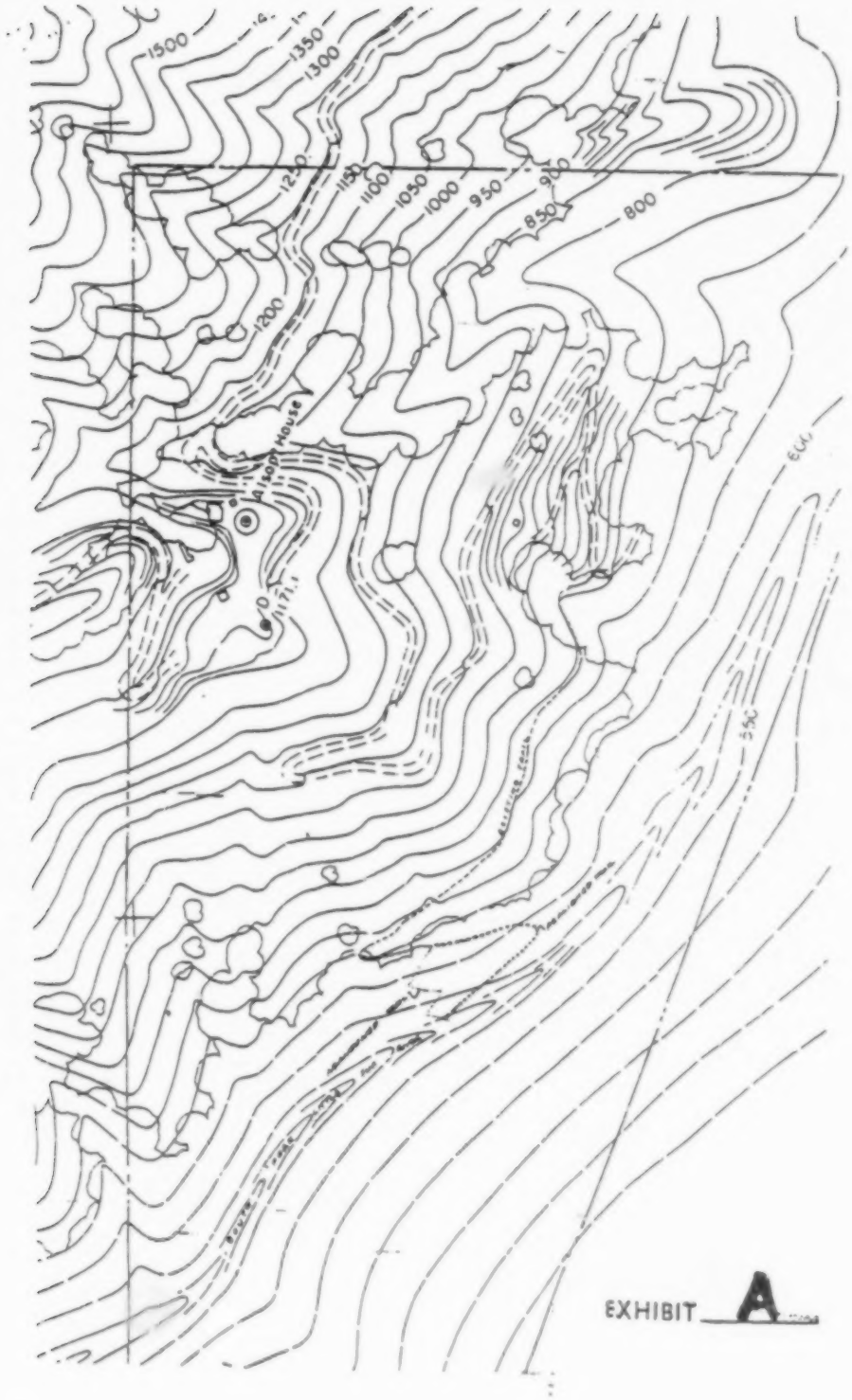
6. Granite Rock Company repaired the trail as described above for the sole purpose of improving the trail for foot traffic. The trail was not repaired to accommodate vehicular traffic, or to create a road, or for any purpose other than as set forth in this declaration.

7. In light of the objections raised to the repair of the trail, Granite Rock Company will consent to an unconditional judgment of this court ordering the restoration of the trail to its original configuration, and re-establishment of the realigned portion of the trail so that the new switchback is abandoned and the original five switchback portion of the trail reinstated, all in accordance with the standards set forth in the letter of Steve Borossay dated February 15, 1983 attached hereto as Exhibit "A", and/or the declaration of Richard V. Violet, former U.S. Forest Service Employee in charge of trail maintenance and construction, which declaration is filed with this motion.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

/s/ BRUCE G. WOOLPERT
Bruce G. Woolpert

Dated: November 14, 1983



[Seal]

Monterey County
Department of Building Inspection
H. William Clarke
Director of Building Inspection
February 15, 1983

Zad Leavy
Attorney at Law
199 Monterey County Bank Building
Carmel, Ca. 93923

Re: Pico Blanco Coalition vs. Granite Rock Company, et al, Monterey Superior Court Number M-12993—A.P.N. 602-383-15

Dear Mr. Leavy:

This letter is in reponse to your correspondence dated January 26, 1983.

On February 11, 1983, our office staff completed a careful examination of the trail owned by Granite Rock Company near the South Fork of the Little Sur River within National Forest Lands. During the inspection of this trail, we were accompanied by Mr. Maurice Alsop, representative of Granite Rock Company.

After considerable examination of said trail and reviewing copy of the summons submitted by your office, we the grading and erosion control staff of the Building Inspection Department, in compliance with the Monterey County Grading and Erosion Control Ordinances, declare the following professional opinions and summary of our findings:

I. The complaint relates to the widening of existing trail, extension of said trail to the river and erosion problems in the near vicinity of the stream. We will discuss all three items separately.

1. In our examination of the existing trail it is clear that some trail maintenance work was done; however, a grading permit is not required for continued maintenance of existing trails or roads. It is obvious that the trail was there before the alleged grading, and it is *still* only a trail, not a road as being described by the complaint.

Our field measurements indicate variable widths, between 4 to 8 feet maximum from edge of cut to top edge of fill banks. In our opinion vehicular traffic could not pass on such a narrow trail; therefore, it is not a road. If there was any widening of said trail, it was not substantial enough to require a grading permit by this office.

2. Extension of the existing trail to the river was a *new cut*, approximately 250 feet in length, average cut .04 feet to 3 feet in width, plus 2 feet fill sidecast. We have not been able to find cuts from 6 to 10 feet in width and verticle cuts as high as 12 feet as alleged by your complaint. The approximate yardage of this minor grading was only 56 cubic yards. Even though the amount is under 100 cubic yards, by Section 104(a) of the Grading Ordinance, a permit will be required only because the vertical slopes do not qualify for grading permit exception. Most interestingly, this *new* trail cut is in good condition without any erosion problems, therefore, we concluded that the property owner made the new trail in compliance with grading standards as normally required by this office.

Mr. Alsop has indicated to us that Granite Rock Company will comply with the permit requirements of Monterey County, even though he had no knowledge that a permit is required when the amount of grading is under 100 cubic yards.

3. With respect to heavy erosion in the river, we found no significant problems. The river is running clean, without any stream obstruction, at this time, at the bottom of the new trail. This area is under the jurisdiction of the Fish and Game Department.

II. The concern we have is with respect ot the temporary restraining order against Granite Rock Company not being able to work on the existing trail. In our opinion, the trail must be maintained by removing some of the slides when necessary, need to provide for proper drainage and prevent erosion on slopes by mulching, etc. in order to prevent *future* erosion into the river. We are not suggesting widening of any of the trails, but we are strongly in favor of general maintenance by small machinery and labor as soon as the permit application is approved by this office.

Mr. Alsop has indicated to us that he can not do any work now on this trail, because of the restraining order. In our opinion the order should be lifted when the permit is ready to be issued.

In conjunction with the permit application Mr. Phil Carrasco, our erosion control specialist will incorporate necessary erosion control measures for the existing trail.

This is our analysis and findings of the above referenced matter in reply to the lawsuit.

Very truly yours,

H. William Clarke
Director of Building Inspection

/s/ STEVE BOROSSAY
Steve Borossay
Senior Engineer

SB/ljd

cc: Judge Robert O'Farrell
Granite Rock Company

AMICUS CURIAE

BRIEF

No. 85-1200 (12)

Supreme Court, U.S.
FILED
JUL 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

CALIFORNIA COASTAL COMMISSION, *et al.*,

Appellants,

v.

GRANITE ROCK COMPANY,

Appellee.

BRIEF *AMICUS CURIAE* OF THE AMERICAN MINING CONGRESS IN SUPPORT OF APPELLEE

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July 31, 1986

20 pp

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No. 85-1200

IN THE

Supreme Court of the United States

October Term, 1985

CALIFORNIA COASTAL COMMISSION, *et al.*,

Appellants,

v.

GRANITE ROCK COMPANY,

Appellee.

BRIEF *AMICUS CURIAE* OF THE AMERICAN MINING CONGRESS IN SUPPORT OF APPELLEE

The interest of *amicus*, statement of the case and Constitutional Provisions, Statutes and Regulations are set forth in American Mining Congress brief dated March 3, 1986 on file with this Court.

SUMMARY OF ARGUMENT

1. The Congress, under the Property Clause of the Constitution, has the power to promulgate needful rules for the public lands and particularly its mineral lands. This it has done with the 1872 mining law. The law and the regulations of the agencies reflect an established national policy of mineral development and surface protection. For so long as the Government retains a revisionary interest in its property, it retains the power to control the use of its lands and to protect them.

2. The 1872 mining law and the Forest Service regulations are not exclusive but allow minor and subordinate state

regulations. The need to maintain the integrity of the Federal laws and Congressional policies is dominant and any state scheme to the contrary is prohibited.

ARGUMENT

I. THE PROPERTY CLAUSE POWER IS GIVEN WITHOUT LIMITATION AND IS EXCLUSIVE OF STATE INTERFERENCE.

The public lands of the United States are held in trust for the people of the whole country. *United States* v. *Trinidad Coal Co.*, 137 U.S. 160 (1890).

It is up to the Congress to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States.

Under this grant of power and in the exercise of control over its property, the Department of Interior was given the responsibility to manage the public domain and to prescribe the process by which claims against the public domain may be perfected. This Court has said: "The United States, which holds legal title to the lands, plainly can prescribe the procedure which any claimant must follow to acquire rights in the public sector." *Best* v. *Humboldt*, 371 U.S. 334,339 (1962).

In *McKelvey* v. *United States*, 260 U.S. 353, 359 (1922) this Court said: "It is firmly settled that Congress may prescribe rules respecting the use of the public lands. It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned." (Citations omitted)

In short, the Property Clause of the Constitution in broad terms gave Congress the right to determine "needful" rules "respecting" the public lands.

As this Court said in *Kleppe* v. *New Mexico*, 426 U.S. 529, 535 (1976) "... determinations under the Property Clause are entrusted primarily to the judgment of Congress ...

And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" (Cases omitted at 539.)

A. The 1872 Mining Law

The 1872 Mining Law[1] was a "needful" rule and an exercise of Congressional authority over the property of the United States. The Congress determined that national policy requires a strong, domestic mining industry. It decided that in 1872 and it reaffirmed that policy in 1970 and again in 1980. (See appendix to March 3, 1986 Brief of this *amicus* for statutory authority.)

In *United States* v. *Weiss*, 642 F.2d 296, 299 (9th Cir., 1981) the court said: "Mining has been accorded a special place in our laws relating to public lands."

Section 22 of Title 30 U.S.C. offers citizens of the United States free and open land to explore for and purchase valuable mineral deposits, "according to the local customs or rules of miners in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States."

What were the local customs or rules of the several mining districts authorized by section 22 and on which the Appellants rely to assert its state regulatory power in this case? (California Coastal Commission, hereinafter called "Commission", June 6 Brief at 22)

Mining Districts originated in the early mining camps, prior to the organization of the states as territories. According to R. S. Morrison, noted mining lawyer and author: "The country was divided into 'Mining Districts,' some less than a

[1] Act of May 10, 1872, 30 U.S.C. §21 (1982) and scattered sections.

mile square and some quite extensive, which have become permanent geographical divisions, and take the place of townships and sections in describing the situation of real estate of all kinds in the mining counties."[2]

Each district adopted a separate code of regulations and elected a recorder to keep a record of the claims and transfers.

The rules of the various districts were more or less uniform in their mode of expression and they included rules regarding boundaries and size of claims, value of labor, etc.

Following are examples of such rules from Morrison:

> Value of Labor. There shall be allowed for a day's labor on all lodes, the following prices: For working in loose rock and earth, twelve dollars per day; for hard rock such as will require powder and drills, sixteen dollars per day." Resolutions 3. Las Animas District.
>
> Lode Notice—That all notices on lodes be written in plain English and posted in some conspicuous place on the lode. Resolution 8. Las Animas District.
>
> Murder. Any person guilty of willful murder, upon conviction thereof, shall be hung by the neck until he is dead. Chap. 16 Sec. 1 Griffith District.

The mining district rules cannot be inconsistent with the laws of the United States.

Lindley on Mines 3rd Ed. (1914) § 249 summarizes the limitations of state legislation as follows: "State statutes in reference to mining rights upon the public domain must therefore be construed in subordination to the laws of Congress, as they are more in the nature of regulations under these laws than independent legislation."

The case of *Butte City Water Co.* v. *Baker*, 196 U.S. 119, 126 (1905) supports the principle that Congress, "after prescribing the main and substantial conditions of disposal . . .

[2] Morrison, *Mining Rights in Colorado*, 7th Ed., 1892.

might rightfully entrust to the local legislature the determination of minor matters respecting the disposal of these lands."

Both the Commission's brief (at 23) and the brief of the *State of Alaska, et al.*, hereinafter called "States" (at 16), cite the *Butte* case as authority for the state's exercise of regulatory power. It is to be noted that the issue in that case was "possessory title" under the law of the state where the claim was located.

The *Butte* case was a dispute between two locators of the same mining ground and involved a state requirement that the mining claimant describe the dimensions and location of the discovery shaft. It was an action of ejectment and not an exercise of traditional health and safety state police power.

The "main and substantial conditions of disposal" of public land are under the aegis of the United States. The mining district or state may adopt "minor and subordinate regulations" on matters concerned with possessory title, but once the possessory title question has been determined in the state court, the scheme of the United States for disposal of its lands and the control of those lands prior to such disposal remain in the United States.

Among the regulations to which the state power extends are quarantine rules, measures to prevent breaches of the peace and unseemly clashes between persons privileged to go upon or use such areas, and herding sheep or permitting them to graze within two miles of the dwelling house of another.[3]

Section 26 of Title 30 U.S.C. gives to locators the exclusive right of possession of the claim so long as they comply with the laws of the United States and with state, territorial and local regulations not in conflict with the laws of the United States governing their *possessory title*.

[3] *McKelvey* v. *U.S.*, 260 U.S. 353, 359 (1922).

In *Shoshone Min. Co.* v. *Rutter*, 177 U.S. 505, 508 (1900) this Court said: ". . . in a given case the right of possession may not involve any question under the Constitution or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact."

The Ninth Circuit in the case at bar held that the Mining Act and the Forest Service regulations do not go so far as to occupy the field of establishing environmental standards and noted that the Forest Service regulations recognize that a state may enact environmental regulations in addition to those established by federal agencies. As in the *Butte* case, the Federal government determines the main and substantial conditions of disposal. Minor and subordinate regulations may be entrusted to the inhabitants of the mining district or state. And while the environmental regulations are not insignificant in and of themselves, in the great scheme of things, as the Ninth Circuit said: ". . . an independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority and is preempted."

The Colorado Supreme Court in *Brubaker* v. *Board of County Commissioners*, 652 P.2d 1050 (Colo. 1982) discussed the provisions of 30 U.S.C. §§ 22 and 26 and recognized a role for state and local regulations with respect to mining claims. It emphasized that these statutes provide that state and local regulations are applicable *only* to the extent that they are not "inconsistent with" or "in conflict with" the laws of the United States. The Court said: ". . . the statutes merely recognize a role for nonconflicting state and local laws; they do not authorize state regulations that would bar the very activities authorized by the mining laws." (at 1058)

In this case, the state seeks to regulate how the federal government uses, controls and disposes of its land. The Federal government, acting under the Property Clause of the Constitution, has provided its own needful rules for its property and opened those lands containing valuable mineral deposits to exploration and purchase (30 U.S.C. §22) under the appropriate departmental regulations. The 1872 mining law

and the regulations preempt any scheme initiated by the state in conflict with it.

As this court said in *Kleppe*:[4]

> Absent consent or cession a State, undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.

II. PROMULGATION OF A SCHEME OF GOVERNMENT REGULATION IS AN ASSERTION OF "NEEDFUL" RULES THAT PREEMPT STATE AND LOCAL REQUIREMENTS.

Section 22 of Title 30 U.S.C. provides that lands belonging to the United States shall be free and open to exploration and purchase (1) "under regulations prescribed by law," and (2) "according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Beginning with the passage of the National Environmental Policy Act in 1969, in excess of fifteen specific laws of the United States having to do with protection of the environment have been enacted.

These laws included the Clean Air Act, the Noise Control Act, the Coastal Zone Management Act, the Endangered Species Act, the Federal Insecticide, Fungicide and Rodenticide Act, the Federal Water Pollution Control Act, the Safe Drinking Water Act, the Toxic Substances Control Act, the Resource Conservation and Recovery Act, the Federal Land Policy and

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[4] *Kleppe*, 426 U.S. 529, 543.

Management Act and the Forest and Rangeland Renewable Resources Planning Act.

The agencies charged with the responsibility of administering those laws have duly promulgated regulations carrying out the Congressional fiat.

The mining law is not "silent on environmental regulations" as the brief of the *amici* States suggests (at 17), but clearly provides for the promulgation of regulations and, as the court said in *United States* v. *Weiss*: "The fact that these regulations have been promulgated many years after the statutory authority does not destroy the Congressional authorization given."[5]

Under the authority of section 2319 of the Revised Statutes (30 U.S.C. 22 *et seq.*) and the Federal Land Policy and Management Act (FLPMA) (43 U.S.C. 1701 *et seq.*), the Bureau of Land Management promulgated regulations (43 C.F.R. 3809) to establish procedures to prevent unnecessary or undue degradation of Federal lands which may result from operations authorized by the mining laws.

The Commission notes (at p. 25 of its brief) the Bureau of Land Management comments in the rulemaking for 43 C.F.R. 3809 as preserving concurrent state authority. Essential to such rules is land use planning, including "meaningful public involvement of State and local government officials" (FLPMA 43 U.S.C. 1712 (c) (9)).

The court's attention is directed to H. Rep. 94-1724, 94th Cong. 2d. Sess. (1976), at 58 (to accompany S. 507, which became FLPMA), in which it is stated:

> (c) The conferees adopted a consolidation of the Senate and House provisions for coordination of BLM land use planning with Federal, State, local governments, and Indian tribes, with revision making clear that the ultimate decision as to determining

[5] *United States* v. *Weiss*, 642 F.2d, 296, 298.

> extent of feasible consistency between BLM plans and such other plans rests with the Secretary of Interior. *This affirmed the need to maintain the integrity of government Federal laws and Congressional policies.* (emphasis supplied)

As Commission notes at 31 of its brief, formal agreements with states for coordination of dual federal and state environmental regulations have been negotiated. But the underlying factor to be considered is, as the House and Senate conferees agreed in drafting the legislation that became the Federal Land Policy and Management Act of 1976, "the need to maintain the integrity of government Federal laws and Congressional policies." The ultimate decision is in the United States.

The precise issue of whether the United States can regulate mining on national forest lands was decided in the case of *United States* v. *Weiss*. The purpose of the regulations was to minimize adverse environmental impacts on National Forest Service resources. The court said: "In this situation, a mining claimant may not claim any sort of prescriptive right which would prevent the government from protecting its superior vested property right."[6]

The Forest Service regulations adopted in 1974 (36 C.F.R. 228) protect the surface resources on all the public lands of the United States under the jurisdiction of the Secretary of Agriculture and provide for state and local government input. See March 3, 1986 Brief of this *amicus* at 9-10.

The Ninth Circuit in this case found that the Forest Service permit authority exhibited in its regulations, preempts an independent state permit system to enforce state environmental standards. We agree and urge this Court to affirm the decision of the Ninth Circuit.

The case of *Hillsborough County, Florida* v. *Automated Medical Laboratories*, 105 S. Ct. 2371 (1985) is cited frequently by the appellants (Brief of the Appellants, at 34, 39),

[6] *Id.*, at 299.

(Brief of the States (at 29)) for the proposition that federal agencies will make their intentions clear on preemption.

Hillsborough was concerned with licensing vendors of blood plasma. The other cases cited by appellant on preemption have to do with licensing brokers, licensing vessels, marine terminals and liquor licenses.

Hillsborough teaches us that "we must look for special features warranting preemption." The special feature in the case at bar is the dominant interest of the United States in the use of its property. The regulations governing property of the United States are "intimately blended and intertwined with responsibilities of the national government." *Hillsborough*, at 2378.

The decision of the Ninth Circuit does not forbid the states from exercising their permit authority with respect to mining claims as the Big Sur brief (at 7) and the brief of the Council (at 4) state. The Ninth Circuit simply said that the Forest Service regulations and the mining law preempt the applicability of the state permit authority, but that environmental regulations are not all preempted. (J.S. App. A-9.)

All the Commission has to do to protect its environmental concerns is to request consistency review (which it failed to do) under the Coastal Zone Management Act and submit its requirements in consultation with the Forest Service personnel and consistent with the Forest Service regulations.

The Forest Service regulations are quite clear that the Forest Service must consider the state requirements as Big Sur admits (at 9 of its Brief) and see March 3, 1986 Brief of this *Amicus* at 10-11.

III. THE THREAT OF "VETO" BY THE STATE IS SUFFICIENT TO BRING THE DOCTRINE OF PREEMPTION INTO PLAY.

The brief of the appellants (p. 38) and the appellants' *amici* all state that the Commission will not veto Granite Rock's

project by denying a permit (Jurisdictional Statement 5), (*Big Sur Foundation, et al.*, hereinafter called "Big Sur" brief at 18).

But Big Sur threatens veto by raising the specter of the high and prohibitive cost of complying with state environmental laws (Big Sur at 19); the imposition of conditions amounting to a taking (Big Sur at 20), and by forcing the miner to "mine elsewhere" (Big Sur at 20).

If state regulation "influences" the location of mining operations and requires the miner to "mine elsewhere," the state can indeed veto the location of the mine in contravention of the express provisions of the 1872 mining law.

Section 26 of Title 30 provides that the mining location will be ". . . made on any mineral vein, lode, or ledge, situated on the public domain. . . ." If the state regulations force the miner to "mine elsewhere" than where the mineral vein, lode or ledge is situated, the state has vetoed the Congressional mandate. Mineral is where it is, not where the state wishes it to be. The mineral deposit cannot be moved from where it is located except by extracting it from the ground. A mining claim located on the ground cannot be moved without losing its point of discovery, and therefore, its validity.

The state would thus destroy the very essence of the mining law that all valuable mineral deposits in lands belonging to the United States shall be free and open to exploration and purchase (30 U.S.C. § 22).

The Big Sur allege they do not want to deny the mining activity but only to enforce the state environment laws. But the briefs make it clear that for scenic and tourist reasons they seek to terminate the mining operation (brief of Big Sur at 13), "it hurts a major local industry—tourism" and "it strains local public services, including roads."[7]

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[7]The Big Sur Coastal Land Use Plan certified by the California Coastal Commission April 10, 1986, includes the following statements:

> The County's basic policy is to prohibit all future public or private development visible from Highway 1 and major public viewing areas. (at 7)

At issue in *Ventura County* v. *Gulf Oil Corp.*,[8] and in *Granite Rock* is the control the Federal government will retain over its property. The Ninth Circuit in *Granite Rock* relied upon the decision in *Ventura* and held that if the Federal law establishes the authority in a Federal agency to prohibit or permit mining in national forests conditioned on meeting environmental protection standards, which it has, then an independent state permit system to enforce its environmental standards would undermine the Forest Service's authority, and it is preempted.

The Ninth Circuit in *Ventura* identified the issue as to whether *Ventura* "has the power of ultimate control over the Government's lessee, . . ." (at 1085). It is the opportunity to control that the Ninth Circuit found to be beyond the power of *Ventura*, whether or not the permit would eventually be granted.

The County's basic policy is to take a strong and active role in the stewardship and safeguarding of Big Sur's irreplaceable natural resources. Where there are conflicts, protection of these natural national resources is the primary objective with definite precedence over land use development. (at 7)

The County's basic policy is that future land use development on the Big Sur coast shall be extremely limited, in keeping with the larger goal of preserving the Coast as a natural scenic area. In all cases, new land uses must remain subordinate to the character and grandeur of the Big Sur coast. All proposed uses, whether public or private, must meet the same exacting environmental standards and must not degrade the Big Sur landscape. (at 8)

The County will also support improved stewardship and management of existing public lands, and where appropriate, consultation with the Federal agencies to insure compatibility of land uses on both Federal and non-Federal lands. The Federal government will be asked to adhere to the same resource conservation policies of the certified Land Use Plan (LUP) as are applicable to other landowners. (at 18)

[8] *Ventura*, 601 F.2d 1080 (9th Cir., 1979). *Aff'd. mem.* 445 U.S. 947 (1980).

To paraphrase this court in *Federal Power Commission* v. *Oregon*, ((1955) 349 U.S. 435, 445), to allow the state to veto *Granite Rock*'s beneficial use in its mining claims by requiring the state's additional permission (and the opportunity to control) would result in the very duplication of regulatory control precluded by the *First Iowa* decision (*First Iowa Hydro-Electric Coop.* v. *F.P.C.*, 328 U.S. 152 (1946).

IV. A GOVERNMENT EMPLOYEE'S GRATUITOUS STATEMENT DOES NOT BIND THE UNITED STATES.

The brief of the Commission (at 13) and the brief of *amici* Council (note 10 at 10) rely upon "three express statements" in Forest Service decision documents as requiring *Granite Rock* to obtain "any necessary" state or local permits (Joint Appendix 36-37, 46 and 54) as evidence that the agency did not intend to preempt local environmental or police power permit requirements.

The statements are: "Granite Rock is responsible for obtaining any necessary permits which may be required by the California Coastal Commission." "Granite Rock is responsible for obtaining all required permits established by Federal, State or local agencies having jurisdiction for environmental components not under the enforcement authority of the U.S. Forest Service," and "The claimant is further responsible for obtaining any necessary permits required by State and/or county laws, regulations, and/or ordinance."

The addition of the reference language to the mining plan and decision documents by an employee of the United States cannot operate to create rights not authorized by law.

This Court said in *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947):

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately

> ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rulemaking power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority. [Cases omitted.]

The District ranger had neither the power nor the authority to waive, amend or nullify the provisions of statutes enacted by the Congress. Cf. *Montilla* v. *United States*, 457 F.2d 978, 986 (1972). And the state cannot rely upon a gratuitous statement in the decision documents to create unauthorized rights in it.

In the *Brubaker* case the Colorado Court had before it a specific requirement included in the plan of operations that the operator must comply with the regulations of the Department of Agriculture and ". . . all Federal, state, County, and Municipal laws, ordinances or regulations applicable to the area of operations covered by this plan."

The trial court held that the quoted language provided an explicit basis for local jurisdiction but the Colorado Supreme Court found the language was "unpersuasive." The court said:

> First, the provision only allows for the operation of "applicable" state and local regulations. Since a state law is not applicable if it is preempted, the scope of the provisions is dependent upon, rather than determinative of, the proper resolution of the preemption issue. Second, even if this provision were construed as an attempt to preserve state and local laws that otherwise would be preempted, such a savings clause would be void as beyond the power of the Forest Service Ranger issuing the permit. Indeed, the Forest Service regulations governing such operating plans recognize that those plans may not be used to prohibit legislatively authorized mining activities. Citing 36 C.F.R. 252.1 now 36 C.F.R. 228.[9]

[9] *Brubaker*, 652 P.2d 1050, 1057.

The same reasoning applies to the statements added by the District Ranger in this case and such statements cannot be used to prohibit or impair the mining scheme authorized under the 1872 mining law and controlled by the Federal regulations.

The legal regime established by the Congress for developing and processing mining claims on the public lands, including procedures for evaluating mining claims and protecting environmental values of the government lands, is paramount.

Furthermore, the language set out above and inserted by the Forest Service employees in decision documents in this case is no more a recognition of concurrent state jurisdiction than is the proviso in section 187 of the Mineral Leasing Act at issue in *Ventura*. The Ninth Circuit in *Ventura*, in construing the proviso "none of such provisions shall be in conflict with the laws of the states in which the leased property is situated[,]" said: "Moreover, the proviso assures only that the Secretary of the Interior shall observe state standards in drafting the lease's terms. It is not a recognition of concurrent jurisdiction."

CONCLUSION

For the foregoing reasons and those set forth in the brief of this *amicus* dated March 3, 1986, this Court should affirm the decision of the Ninth Circuit.

Respectfully submitted,

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July 31, 1986

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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No. 85-1200

In The

Supreme Court of the United States

October Term, 1985

CALIFORNIA COASTAL COMMISSION, et al.,
a corporation,

Appellants,

v.

GRANITE ROCK COMPANY, a corporation,

Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF ALASKA MINERS ASSOCIATION, MINERS ADVOCACY COUNCIL, AND PLACER MINERS ASSOCIATION IN SUPPORT OF APPELLEE, GRANITE ROCK COMPANY

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INTEREST OF AMICI CURIAE

Pursuant to Rule No. 36 of this Court, this brief of amici curiae, Alaska Miners Association, Miners Advocacy Council, and Placer Miners Association (Miners), is submitted in support of Granite Rock Company, appellee. The Granite Rock Company and appellants, California Coastal Commission, consented to the filing of this brief, as shown by documents lodged with the Clerk of this Court.

Alaska Miners Association is a nonprofit, tax-exempt organization incorporated under Alaska law. Placer Miners Association and Miners Advocacy Council are nonprofit, tax-exempt associations, organized and existing under Alaska law.

These organizations and their members, some of whom own unpatented mining claims on federal lands inside the Alaska coastal zone, seek to preserve the viability of the Alaska mining industry. They believe that governmental regulation of mineral exploration and development must fulfill statutory mandates without crippling the mining industry.

Amici believe, in accordance with the holding of the Ninth Circuit Court of Appeals in this case, *Granite Rock Company v. California Coastal Commission*, 768 F.2d 1077 (9th Cir. 1985), that a state has no legal authority to subvert federal approval of mining projects on federal lands. Should this Court embrace appellants' arguments and rule otherwise, congressional intent will be frustrated and the mining industry, particularly small scale mining operators already struggling to stay afloat, will confront yet another debilitating and unnecessary regulatory mire.

Miners believe that the state should remain free to regulate and permit those issues not regulated by the federal government, or those areas the federal government asks the states to regulate, such as air and water quality, but not areas already covered by federal decision making, such as the decision at stake here to allow mining to proceed. Miners also believe that for federal mining properties within the geographic province of the coastal zone, consistency review pursuant to the Coastal Zone Management Act

(CZMA) is the proper role for state regulation, and not independent permitting authority. This is particularly important in Alaska, because the state defines *all* lakes and streams to be within the coastal zone. Miners, due to their public interest perspective, believe that they can provide this Court with a more complete argument regarding the issues at stake in this case such as the impact and propriety of dual federal-state permitting regulation of unpatented federal mining claims in the coastal zone.

OPINIONS BELOW

The decision of the United States District Court for the Northern District of California is reported in *Granite Rock Company v. California Coastal Commission*, 590 F. Supp. 1361 (N.D. Cal. 1984). The Ninth Circuit Court of Appeals' decision which is the subject of this appeal is reported in *Granite Rock Company v. California Coastal Commission*, 768 F.2d 1077. Both opinions are reproduced in appellants' appendix to jurisdictional statement (Appendix).

STATEMENT OF THE CASE

This case arises from the California Coastal Commission's attempt to impose coastal development permit requirements on mining operations conducted on unpatented mining claims located near the California coast.

In 1981, the Granite Rock Company, a family-owned company incorporated in California, engaged primarily

in the business of rock and gravel quarrying, applied to the United States Forest Service for a plan of operations permit to allow mining on land located in the Los Padres National Forest. The California Coastal Commission, a state agency charged with regulating California coastal development, was entitled under 16 U.S.C. § 1453 to conduct a CZMA consistency review. The coastal commission failed to do so within the statutory time limit, however, thus raising the conclusive presumption of state concurrence. 16 U.S.C. § 1456(c)(3)(A). The Forest Service approved the Granite Rock Company's plan of operations. See Ninth Circuit decision, Appendix at A-2. This approval was granted in conformance with all environmental laws. In 1984, after lawfully conducting its mining operations for three years the Granite Rock Company was ordered by the coastal commission to apply for a coastal development permit or shut down. Appendix at A-2, and District Court opinion below, Appendix at A-16.

Shortly thereafter, the Granite Rock Company filed suit in District Court for the Northern District of California contesting the extent of jurisdiction of the coastal commission over its mining operation. Appendix at A-16.

Granite Rock argued before the District Court, Northern District of California, that its claims were outside the "coastal zone" subject to coastal commission jurisdiction and that its operations were not subject to commission permitting authority. Appendix at A-16. The District Court, however, held that federal land upon which unpatented mining claims were located was not federal property excluded from the CZMA's "coastal zone," and that the coastal commission was free to regulate the claims as it pleased. Appendix at A-17 to A-32. The Ninth Circuit,

however, reversed and made it plain that this scenario was contrary to the federal purpose of encouraging mining embodied in the Mining Law of 1872, 30 U.S.C. § 21, *et seq.* Appendix at A-6 to A-10. The regulation of mining operations must be reasonable, the court held, and to impose a second tier of redundant permitting authority is simply not reasonable. Appendix at A-9. The court did not find any particular state statute unconstitutional, but merely that the permit mechanism could not apply in the present regulatory scheme. Appendix at A-9.

However, the court also strongly confirmed the right of a state to set its own environmental standards to mining operations on federal lands, which the Forest Service must apply by virtue of its own regulations. Thus, this decision represents the best and most workable solution for the regulation of mining operations on federal lands. The state can set its own stringent environmental standards which the Forest Service will enforce, but the miner is free to proceed after obtaining the necessary federal permits without the cloud of another totally redundant permit requirement which would do nothing for the environment but certainly would discourage investment in resource development.

It should be noted that in the event that the federal government refuses to apply state standards a state would be free to sue the federal agency for failure to comply with its own regulations. Also, for those activities and concerns not specifically covered by a federal decision making permit process, or where state permits are required by federal statute, such as state permits pursuant to the Clean Water Act, a state is still free to require permits in order to protect state resources.

SUMMARY OF ARGUMENT

This Court should find that no jurisdiction exists to hear this appeal, or in the alternative the judgment of the Ninth Circuit Court of Appeals should be affirmed for the following reasons:

1. Because unpatented mining claims on federal land fall outside the federal and state definitions of the "coastal zone," this latest attempt by the coastal commission to exercise jurisdiction beyond its statutory authority should be repelled.

2. The Ninth Circuit's judgment below does not usurp any legitimate state authority to protect and regulate the environment.

3. The congressional policy to encourage mining is advanced by the Ninth Circuit's decision.

ARGUMENT

I

THIS CONTROVERSY IS JUST THE LATEST IN A SERIES OF CASES WHERE THE CALIFORNIA COASTAL COMMISSION HAS ATTEMPTED TO EXERCISE JURISDICTION BEYOND ITS STATUTORY AUTHORITY; THE COMMISSION HAS NO REGULATORY AUTHORITY OVER UNPATENTED FEDERAL MINING CLAIMS

The California Coastal Commission has no state statutory authority to regulate federal mining claims and is in fact expressly constrained from regulating mining claims by federal and state statutes. Nevertheless, the commission has blithely ignored the statutory limits to its authority in its quest to stop mining on the California coast.

The coastal commission and certain amici for appellants attempt to cast the commission as a benign agency dedicated only to protecting coastal resources for the citizens of California. In fact, many of the commission's actions reflect a blatant attempt at engineering broad public policy goals under the guise of resource protection and at the expense of California citizens. This portion of the brief will explicate the structure and relevant history of the commission so that this Court will better understand the limits of its territorial jurisdiction. Alaska Miners find this history particularly interesting because the example it sets for Alaska's coastal commission is disturbing, and because the regulatory excess practiced by the commission is very damaging to every rational development activity along the coast.

A. The Nature of the Coastal Commission Is to Exceed Its Jurisdiction and Authority

The commission came into being in 1977 following the passage of the Coastal Act of 1976, Pub. Res. Code § 30000, *et seq.*, as amended. Under the Coastal Act the commission "shall have the primary responsibility for the implementation of the provisions of this division," Pub. Res. Code § 30330, among which are the legislatively identified goals of California for the coastal zone. These goals include protecting the environment of the coastal zone, assuring orderly development of the coastal zone taking into consideration the economic needs of the state, maximizing access to the coastal zone, giving priority to coastal-dependent development, and assisting local entities to plan for effective use of the coastal zone. *See* Pub. Res. Code § 30001.5.

The commission is composed of 15 members. There are three ex officio members, the Secretaries of the Resources Agency and the Business and Transportation Agency, and the Chairman of the State Lands Commission. Pub. Res. Code § 30301(a)(c). There are six at-large representatives of the public, two of whom are chosen each by the Governor, the President Pro Tem of the Senate, and the Speaker of the Assembly. *Id.* at Section 30301(d). The remaining six members are county supervisors or city councilmembers from areas within the original six regional commissions. Again the Governor, President Pro Tem of the Senate, and Speaker of the Assembly each appoint two such local government members. *Id.* at Section 30301(e).

The commission has been controversial from its inception. Perhaps the area that has generated the most opposition to the commission's perceived mandate in the coastal zone is the use by the commission of its permit conditioning power, Pub. Res. Code § 30607, to require access through and along the parcels of coastal property owners. *See* Pub. Res. Code §§ 30210, 30211, 30212. The commission appeals to the California Constitution, Article X, Section 4, for its ability to "maximize" coastal access in this manner.

Numerous individuals and property owners have pointed out that the right of access announced in the California Constitution is one to the "navigable waters" of the state along the public trust tidelands, not one of access to the shorefront over private property. *See, e.g.*, Johnson, *Public Access and the California Coastal Commission: A Question of Overreaching*, 21 Santa Clara

L. Rev. 395 (1981); Pacific Legal Foundation, *The California Coastal Commission in the '80s: Disquieting Continuities and Suggestions for Reform* (1985). The commission nevertheless continues to assert its ability to extract such dedications despite the proscription of the Coastal Act of takings of this sort. *See* Pub. Res. Code § 30010.

In the case of Granite Rock, the coastal commission is asserting permit authority where it has no statutory authority. This, however, is hardly the first instance of overreaching. The commission has always been ready to push its regulatory ambitions to the statutory limit and beyond. In the context of permit conditioning this is well illustrated by the case of *Liberty v. California Coastal Commission*, 113 Cal. App. 3d 491 (1980). In *Liberty*, appellant was the owner of a new restaurant to be constructed in an area of frequent traffic congestion. After appellant gained approval from the regional commission, the state commission on appeal from an environmental group added to its own conditions increasing the number of required parking spaces and requiring the restaurant owner to make his parking lot available free to beach users daily until 5:00 p.m. and to advertise its availability. *Id.* at 504.

The appellate court reversed the coastal commission and in response to arguments that this was a legitimate exercise of police power found that the "State Commission is here attempting to disguise under the police power its actual exercise of the power of eminent domain." *Id.* The court thus carefully distinguished between the legitimate use of the police power and the commission's rationalization of its own agenda. Nevertheless, as demonstrated by the present controversy, the commission's desire to push for its own agenda continues to interfere with its jurisdictional limits.

The same overreaching can be seen in the context of state/federal relations as well. In 1977, the Secretary of the Interior announced that federal leases for oil and gas exploration would be offered off the California coast, the first such offered since 1969. The commission attempted to use the consistency review provisions of the Coastal Zone Management Act of 1976, 16 U.S.C. § 1451, *et seq.*, to reach the federal government's decision to hold the lease sale. The United States Supreme Court eventually settled the determination to the disadvantage of the commission's regulatory ambitions; such lease sales did not directly affect the coastal zone. *Secretary of the Interior v. California*, 464 U.S. 312 (1984).

Nor has duplication of authority and environmental review deterred the commission from seeking to expand its regulatory purview. The commission exercises consistency review authority under the federal CZMA for federal activities directly affecting the coastal zone. 16 U.S.C. § 1456(c). There is no debate that outer continental shelf (OCS) exploration and development/production activities do directly affect the zone. Therefore, when federal agencies approve lessees' OCS activities, the commission has the opportunity for further environmental review. Federal environmental review is rigorously demanding. The commission, regrettably, has used the limited consistency determination provided by the CZMA to introduce yet another complete set of environmental criteria and requirements. Federal officials have pointed out to the commission the redundancy of the commission's enactments, and the usurpation of federal decision making they entail. *See* letter dated September 7, 1984, of

William E. Grant, Regional Manager, Minerals Management Service (MMS), to Mel Nutter, Chairman, California Coastal Commission, and excerpt from MMS comments, attached hereto as Miners' Appendix A. The commission claims it is merely carrying out the state police power review committed to it by the CZMA. Federal regulators who have dealt with the commission's encroachments in practice know that the unauthorized extent of the commission's intrusion reveals an intent to frustrate and delay the achievement of the federal purpose—expeditious and environmentally safe development of the OCS. In the present case before this Court it is the height of irony that the coastal commission neglected to utilize the available consistency review process when it has already decided that its powers under this procedure are virtually without limit.

Finally, it should be noted that there are presently no legally binding precise dimensions for the state police power regulation of mining now claimed by the commission. Inasmuch as the commission argues that the Granite Rock activity constitutes "development" under the Coastal Act, it would in the ordinary course of its permit process apply its Statewide Interpretive Guidelines to Granite Rock to determine the mitigation measures it would impose.[1] The California Office of Administrative

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[1] In the guidelines, for example, the commission states that "all new development resulting in any intensification of land use generates sufficient burdens on public access to require access conditions in conjunction with that development." Statewide Interpretive Guidelines at 13. Thus, the commission routinely requires public access easements in exchange for development permits. There is no evidence that Granite Rock would be treated differently.

Law (OAL), however, has determined that these guidelines (and the policy statements indicated above) constitute illegal underground regulations that have been adopted and employed in contravention of the California Administrative Procedure Act. OAL Determination, April 30, 1986. The implications of this determination are twofold: (1) the commission may not, under California law, legally impose permit conditions relying on the banned guidelines; and (2) responsible federal officials are entitled to have the guidelines submitted to them for a determination of their propriety as amendments to the California Coastal Management Program. *See* letter of Peter Tweedt, National Oceanographic and Atmospheric Administration, to Peter Douglas, Executive Officer, California Coastal Commission, attached hereto as Miners' Appendix B. The commission claims an entitlement to open-ended discretion to apply its state police power regulation. The criteria for this application have been declared illegal and inapplicable. In the absence of substantive limits to the regulatory ambitions of the commission, now is a particularly inappropriate time to seek an unprecedented expansion of commission authority over federal property.

B. The Commission Lacks Statutory Jurisdiction Over Federal Mining Claims

When it attempted to impose direct regulatory control over federally approved mineral development on Granite Rock's unpatented mining claims, the coastal commission was not only carrying on its tradition of regulating that which is preempted by federal law, but it was

also flouting express statutory proscriptions on its authority. While the Ninth Circuit's decision, as well as briefs submitted by and on behalf of Granite Rock, show plainly that the commission is preempted from requiring mining to stop until a coastal commission permit is secured, it is also evident that the Ninth Circuit could alternatively have addressed the statutory limits to the coastal commission's jurisdiction. In fact, the plain language of state law reveals that the Ninth Circuit's decision resulted in no finding that any *applicable* state law is unconstitutional. Federal mining claims are outside the coastal zone and the coastal commission has no direct regulatory jurisdiction in any territory *but* the coastal zone.

The jurisdiction and authority of the coastal commission is outlined in California Public Resources Code § 30000, *et seq.* Section 30101.5 provides that a

> "'[c]oastal development permit' means a permit for any development *within the coastal zone* . . . ." (Emphasis added.)

Section 30604(d) states that

> "[n]o development or any portion thereof which is outside the coastal zone shall be subject to the coastal development permit requirements of this division . . . ."

This could not be more clear: the commission has no statutory authority to require development permits outside the coastal zone. The definition of the coastal zone is controlled by the federal Coastal Zone Management Act, 16 U.S.C. § 1451, *et seq.* Sections 1455 through 1456 of that Act provide that state programs, such as that later set up by the California Coastal Act, must be in conformance with federal law. For a state program to be funded by

the federal government it must comply with federal standards and be approved by the Secretary of Commerce. 16 U.S.C. § 1456. Although there is now serious question whether the California program has fallen out of conformance with federal law, *see* attached Miners' Appendix B, there is no question that California is bound by and has acquiesced to the definition of the coastal zone found in federal statute and regulation. The applicable federal law leaves absolutely no doubt that unpatented federal mining claims are *not* within the coastal zone. The Coastal Zone Management Act states that

> "[e]xcluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." 16 U.S.C. § 1453(1).

The Commerce Department interpreted this exclusion to mean that

> "[s]tates must exclude from their coastal management zone those lands owned, leased, held in trust or whose use is otherwise by law subject solely to the discretion of the Federal Government . . . ." 15 C.F.R. § 923.33(a) (1985).

It is well established that "fee title passes only on issuance of a patent without a reservation." *Elliott v. Oregon International Mining Company,* 654 P.2d 663, 668 (Or. App. 1982), *citing Best v. Humboldt Placer Mining Company,* 371 U.S. 334, 336 (1963); *Freese v. United States,* 639 F.2d 754, 755 (Ct. Cl. 1981). *See* 30 U.S.C. § 26. To put it bluntly, the lands of national forests such as Los Padres National Forest are *owned* by the federal government, and the location of a mining claim does nothing to divest title from the federal government until such time as the land is patented.

Even if it were not for the absolutely unambiguous language of the Department of Commerce regulation showing that lands "owned" by the federal government are outside the coastal zone, the statutory language itself makes it doubly plain that mining claims are not within the coastal zone.

First, mining claims are subject solely to the discretion of the federal government. Until they are patented, claims are on property owned by the federal government. The federal government can at any time condemn the mining claims to satisfy other federal purposes. *See North American Transportation & Trading Co. v. United States,* 53 Ct. Cl. 424 (1919), *aff'd,* 253 U.S. 330 (1920). The Forest Service has an immense degree of regulatory discretion over mining claims. *See, e.g., United States v. Richardson,* 599 F.2d 290 (9th Cir. 1979), *cert. denied,* 444 U.S. 1014 (1980). Finally, in *Kleppe v. New Mexico,* 426 U.S. 529, 539 (1976), this Court held that " '[t]he power over the public land . . . entrusted to Congress is without limitations.' " Activities on federal mining claims plainly fall within the first prong of the coastal zone exclusion in 16 U.S.C. § 1453(a).[2]

Second, mining claims are also located on lands "held in trust" by the federal government. This Court has held time and time again that national forest lands are held in trust by the federal government. *See, e.g., United States v. California,* 332 U.S. 19, 40 (1947); *Light v. United*

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[2] For an extended discussion of the nature of federal discretion over mining claims see Burling, *Local Control of Mining Activities on Federal Lands,* 21 Land and Water L. Rev. 34, 38-42 (1986).

States, 220 U.S. 523, 536-37 (1911); *United States v. Trinidad Coal and Coking Co.,* 137 U.S. 160 (1890); and *United States v. Beebe,* 127 U.S. 338 (1888).[3]

Finally, this Court held that all federal lands were excluded from the coastal zone in *Secretary of the Interior v. California,* 464 U.S. 312.

For the coastal commission to ignore the crystal clear language of federal statute and regulation by asserting permitting authority over federal mining claims is arrogance in the extreme. While this might not be surprising in light of the commission's past track record in the field of regulatory abuse, it is disturbing that the commission now attempts to mislead this Court by creating the rather disingenuous argument in its Brief for Appellants that "[i]t is undisputed that, as a matter of state law, the Coastal Act permit requirement applies to Granite Rock's mining activities" and "that Granite Rock's mining is occurring within the geographic bounds of the coastal zone." Appellants' Brief at 3 and 3 n.5. This is sheer nonsense. Because the commission's authority to apply permitting requirements is proscribed by federal *and state* law, and because the state law is also limited by the CZMA, it is plain that as a matter of state law the commission may not require a permit. As for the state's argument that mining claims are within the "geographic bounds" of the coastal zone, it is evident this is sophistry because the federal lands exclusion is in no way limited by geographical considerations. In conclusion, because state law

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[3] *See also* Burling, *supra,* note 2 at 42-44.

as well as federal law plainly deny the coastal commission permitting authority over federal lands, there is no credible argument that the effect of the Ninth Circuit's decision found any applicable state law unconstitutional. There is no applicable law granting the commission jurisdiction, and therefore the result of the Circuit Court's decision is correct. Accordingly, it is also evident that this Court lacks jurisdiction under 28 U.S.C. § 1254(2).

II

THE NINTH CIRCUIT CORRECTLY HELD THAT THIS EXERCISE OF THE COMMISSION'S PERMITTING AUTHORITY IS PREEMPTED BY FEDERAL LAW

The briefs of the coastal commission and amicus curiae for appellants are replete with unfounded exaggerations as to the effect of the Ninth Circuit's decision. These briefs leave the impression that the Ninth Circuit preempted all state environmental regulation of private mining in national forests, that a "per se" rule against all state permitting was created, or even that a host of federal environmental statutes are now totally ineffective. *See, e.g.,* Brief for Appellants, *passim,* and Brief of Amici Curiae, The Big Sur Foundation, *et al., passim.*

However, the precise holding of the Ninth Circuit, as well as the facts underlying the case, make it clear that the Ninth Circuit's holding of preemption is limited only to those instances where a state agency attempts to impose a veto power over activities on federal lands already permitted by the federal government where such a veto power is based on state consideration of issues or areas of concern already reviewed by the federal agency pursuant to federal

law. The court did nothing to preempt state regulation or control of any issue not already considered, regulated, and approved by the federal government.[4]

The brief of amici curiae, Big Sur Foundation, is especially egregious in its exaggeration of the effect of the decision below. For example, that brief creates the unfounded impression that California will no longer be able to regulate to prevent water pollution. *See* brief of Big Sur Foundation at 3-7. This is a severe misunderstanding of the holding. First, the coastal commission is ***not*** the agency responsible for water quality in the coastal zone; rather that authority vests in the relevant regional water quality control board. Cal. Water Code § 13240, *et seq.* Second, the Ninth Circuit did not conclude that *all* state permitting authority was preempted; in the case of water quality the state program was created in cooperation with the federal government pursuant to the mandates of the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and the court below simply did not reach or need to consider the issue of whether permitting by a regional water quality control board would be preempted. What is plain, however, is that *this* attempt by the commission to impose a permit requirement on Granite Rock was well outside any state law or federal "cooperative" legislation because it interfered with Forest Service decision making. Third, the Big Sur Foundation cites to no statutory source demonstrating that the commission's authority to protect the environment usurps regional water quality control board authority and/or extends *outside* the coastal zone. Such authority does not exist.

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[4] For extended discussion of federal preemption over local mining activities, *see* Burling, *supra*, note 2 at 44-55.

In conclusion, the Ninth Circuit did nothing to exclude private mining operations on federal lands from environmental regulation. It held only that in this case where a federal agency had the power and authority to enforce environmental standards, and where such an agency *did* regulate to protect the environment, then a state agency with no statutory authority for independent regulation cannot interfere and impose veto power over those activities already regulated and approved by the federal government.[5]

III

THE FEDERAL POLICY TO ENCOURAGE MINING IS FULFILLED BY THE DECISION BELOW

The Ninth Circuit correctly began its analysis of the preemption issue by noting that "[t]he purpose of the Mining Act is to encourage mining on federal lands." Appendix at A-6. This policy is based on a long line of federal statutes culminating most recently in the National Materials and Minerals Policy, Research and Development Act of 1980, 30 U.S.C. §§ 1601, 1602, and 1605.

Despite the fervent wishes of the commission and some of its amici supporters, this policy is as fundamental to congressional vision today as it was in 1872 when the present mining law was first enacted. It is also just as vital to

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[5] It should also be noted that the Big Sur Foundation's allegation that Granite Rock has already caused water pollution is misleading in the extreme. Big Sur brief at 4. The activity complained of was on private land outside exterior boundaries of the national forest, was not part of any mining activity, was designed to improve a hiking trail, has not been shown to have contributed to any erosion, and is under litigation. *See Granite Rock Co. v. California Coastal Commission,* No. 79877 (Monterey County Superior Court, filed October 24, 1983). *See also* Granite Rock's motion to strike.

our national economy and security as it was in 1872, if not more so. *Id.* What has changed is a greater understanding by Congress and the mining industry that our need to develop mineral resources must be accomplished in a manner to minimize damage to the environment. Thus, many environmental statutes have been enacted in the past two decades. However, these worthy environmental laws have never been seen by Congress or the courts as abrogating the strong federal policy to encourage mining. Nor is there any evidence that the preemptive effect of the mining laws is undermined rather than complemented by federal environmental legislation. Where a local government takes an action to unjustifiably interfere with or make impossible the terms of the federal mining law, mere invocation of the word "environment" is not enough to legitimatize the abrogation of federal law.

This lawsuit, however, has little to do with the cause of environmental protection. It is instead a clear example of the machinations of a particular state agency, an agency with members appointed by several separate government branches and responsible to none. This agency plainly does not like mining and will stop at nothing, including its jurisdictional constraints and the express policy of the Congress of the United States, to prevent mineral development.

The United States Forest Service fully regulates mining activities on federal lands. It takes seriously its mandates to encourage mining and to protect the environment. It will by regulation enforce state environmental standards. *See, e.g.*, 36 C.F.R. § 228.8 (1985). If it fails to do so there is nothing to stop a state from suing the Forest Service to abide by its regulatory duties.

For a state agency to enter the scene, exercising authority denied by state and federal statute, and to attempt to reconsider, reregulate, and repermit the carefully reasoned decisional process of the Forest Service is plainly unwarranted. It is also preempted. Specific statutes spell out what state agencies can and cannot do in the regulation of unpatented mining claims and no statute gives the coastal commission its assumed power in this case. The mining laws and Forest Service regulations do not allow this exercise of assumed power. The Ninth Circuit's decision was correct.

CONCLUSION

For the foregoing reasons the decision below of the Ninth Circuit Court of Appeals should be affirmed.

DATED: July, 1986.

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APPENDIX A

September 7, 1984

Mr. Mel Nutter
California Coastal Commission
631 Howard Street, 4th Floor
San Francisco, CA 94105

Re: Draft Policy Statement on Conflicts Between the Commercial Fishing and Oil and Gas Industries

Dear Mr. Nutter:

We would like to offer comments on the above referenced draft policy statement. As another public agency we feel our comments may be helpful in the preparation of the final statement. Our staff of scientists and engineers is available to confer with you should you need additional technical expertise on policies presented in this document. If you have further questions, please contact Ms. Julia Van Auker at (213) 688-6340 or Ms. Lynnette Vesco at (213) 688-6745.

Thank you for the opportunity to comment on this mutual issue. Our comments are enclosed with this letter.

Sincerely,

William E. Grant
Regional Manager

Enclosure

bcc: Michael L. Fischer
Executive Director
California Coastal Commission

Ellen Aronson, Reston, VA
Mary Ann Turner, Reston, VA

File: Coop. w/Calif. Coastal Commission
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General

This draft policy statement proposes and evaluates many policy items which are now contained in current rules and regulations of several different agencies (Minerals Management Service, State Lands Commission, California Department of Fish and Game, United States Coast Guard, and others). These varied rules and regulations promulgated by these agencies are explicitly followed by OCS operators. The Coastal Commission's draft policy statement therefore constitutes duplication of existing rules and regulations.

The draft policies presented here also show a remarkable consistency in lack of balanced evaluation between adverse impacts related to oil and gas operations and those adverse impacts related to commercial fishing operations. These include economic impacts as well as environmental impacts. A rational and judicious assessment of any impacts posed by OCS operations needs to present the issues in a balanced and unbiased manner.

Authority

It is inappropriate for the CCC to develop a policy statement on conflicts between the commercial fishing and oil and gas industries, particularly for activities on the Outer Continental Shelf (OCS). The commercial fishing issues discussed by the CCC are economic issues and therefore are **not within CCC's consistency authority. The Commission's** assertion of their jurisdiction over an activity which does not affect the land and water in the coastal zone is directly contrary to Section 307(c) and (e) of the Coastal Zone Management Act.

Under the Outer Continental Shelf Lands Act (OCSLAA) and subsequent judicial decisions, the Secretary of the Interior is solely responsible for resolving conflicts between OCS oil and gas operations and fishing activities. [See OCSLAA 43 U.S.C. 1801(13), 43 U.S.C. 1802(7), 43 U.S.C. 1334(a)(1)(B), 43 U.S.C. 1334(a)(2)(A)(i), 43 U.S.C. 13409g)(3), 43 U.S.C. 1344(a)(2)(D), and 43 U.S.C. 1351 (h)(1)(D)(i)]. See also *Commonwealth of Massachusetts v. Andrus* 594 F2d 872). This responsibility has been delegated to the Minerals Management Service.

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APPENDIX B

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
Office of Ocean and Coastal Resource Management
Washington, D.C. 20235

N/ORM4:MS

June 9, 1986

Mr. Peter M. Douglas
Executive Director
California Coastal Commission
631 Howard Street, 4th Floor
San Francisco, California 94105

Dear Mr. Douglas:

This letter discusses the California Office of Administrative Law (OAL) Decision No. 85-003, issued on April 30, 1986, which determined that the Coastal Commission's eight Statewide Interpretive Guidelines and three Policy Statements (policies and guidelines) are "regulations" under the California Administrative Procedure Act (APA), and are therefore invalid and unenforceable unless adopted pursuant to the APA. Specifically, we will address the impact of the OAL decision on whether the Commission must submit the policies and guidelines to the Office of Ocean and Coastal Resource Management (OCRM) for incorporation into the federally approved California Coastal Management Program.

Because OAL is charged under Section 11347.5 of the Government Code with the responsibility to determine the legal effect of agency enactments under California law, we defer to its decision on that point. Moreover, we find persuasive the decision's key conclusion that the term

"quasi-legislative power", referred to in Government Code Section 11346, includes "interpretive rules". We also agree with and defer to OAL's conclusion that the Commission's policies and guidelines are within the scope of the APA definition of "regulation" because they purport to apply statewide to all persons seeking permits, and they implement and interpret the California Coastal Act.

Now that OAL has settled the legal effect of the Commission's policies and guidelines under state law, we must determine the appropriate relationship between these enactments and California's federally approved Coastal Management Program. Our inquiry into whether these policies and guidelines should be submitted to OCRM for approval as program changes considers whether in practice the Commission requires that an activity comply with the policies and guidelines before it will concur with a Federal consistency certification pursuant to 15 CFR § 930.63.

As to the Commission's Federal consistency certification practices, OCRM is aware of a number of Federal consistency reviews in which the Commission's Staff Reports restate provisions of the policies and guidelines as apparent requirements which the activity must satisfy before the Commission will concur. The Minerals Management Service documented nine separate instances of this practice in its April 1, 1986 letter to Commission Chairman Wornum. I have enclosed a copy of the letter for your convenience.

As I stated in my March 14, 1986 letter to you, we are also aware that the Commission's recent rejection of the consistency certification for the Draft General National

Pollution Discharge Elimination System (NPDES) permits was based at least in part on the muds and cuttings policy dated November 7, 1984.

In your March 26, 1986 letter to me defending the Commission's objection to the General NPDES permits consistency certification, you stated that although the Commission "considered" the muds and cuttings policy, it was not the "controlling legal basis" for the objection. I find no support for this distinction in the Coastal Zone Management Act (CZMA) or in its implementing regulations. The "controlling legal basis", in fact, the only legitimate basis for State agency review of a Federal consistency certification is explicitly established by Section 307(c)(3) of the CZMA, which restricts a state's inquiry to whether it concurs with an applicant's "certification that the proposed activity complies with the state's *approved program* and that such activity will be conducted in manner consistent with the program." (Emphasis added.)

We agree with the statement in your March 26 letter that the Commission may properly consider all relevant information before it in making Federal consistency decisions. However, OCRM believes that for the purpose of Federal consistency proceedings, the Coastal Zone Management Act requires relevancy to be defined in terms of a State's approved coastal management plan. Since none of the Commission's eleven challenged policies and guidelines are part of California's approved program, by definition they are not a relevant consideration in California consistency proceedings.

Our review of the Commission's Federal consistency proceedings leads us to the conclusion that the Commission

has established a practice of requiring that an activity comply with its policies and guidelines before it will concur with the activity's consistency certification. The Commission's practice of treating the policies and guidelines as mandatory requirements in consistency reviews corroborates the OAL decision that the policies and guidelines have the effect of regulations under California law, but conflicts with the statement in your March 26 letter "that the muds and cuttings [policy] does not have the force or effect of law, but serves only as guidance. . . ." Based on the OAL decision and the Commission's use of the policies and guidelines in Federal consistency proceedings, we conclude that the eleven challenged policies and guidelines are program changes. Therefore, the Commission must discontinue its practice of requiring compliance with its policies and guidelines in consistency proceedings until they have been submitted to OCRM and received our approval as part of the federally approved California Coastal Management Program.

Since the OAL decision concluded that the policies and guidelines are invalid and unenforceable unless adopted as regulations, OCRM cannot approve the policies and guidelines unless the Commission submits them as adopted regulations. Of course, approvability also depends on compliance with the other requirements of the CZMA and its implementing regulations. OCRM has begun an independent review of the nine policies and guidelines in our possession to ascertain their consistency with the CZMA. We cannot locate the policies on Oil Spill Response Measures, and Conflicts between Vessel Safety and Oil and Gas Operations. Please send copies of these two policies to us.

Please let me know in the next thirty days how you will recommend that the Commission respond to the OAL decision. Although you told my staff in mid-April that you would recommend withdrawal of all the policies and guidelines if OAL decided they were regulations, you mentioned in early May that you would instead recommend disregarding the OAL decision. If you have recommended disregarding the OAL decision, please send me the rationale for your decision. If the Commission decides to promulgate the policies nd guidelines as regulations, please supply us with the Commission's tentative rulemaking schedule, as well as its schedule for submitting the new rules to OCRM for formal review.

Sincerely,

Peter L. Tweedt
Director

Enclosure

cc: Members of California Coastal Commission